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No. 99-

IN THE

Supreme Court of the United States

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner,

v.

JANET RENO, as Attorney General of the United States, and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELLIOT H. SCHERKER
Counsel of Record
OSCAR LEVIN
BRENDA K. SUPPLE
GREENBERG TRAURIG, P.A.
Attorneys for Petitioner
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

159987

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

278 pp

QUESTION PRESENTED

Mr. Mejia is facing deportation from the United States after having lived here since the age of 15 years. He was denied the opportunity to seek a suspension of deportation under the pre-1996 Immigration and Nationality Act, based solely on an unconstitutionally-obtained Florida conviction — which conviction has since been vacated by the Florida courts because the conviction was tainted by a denial of the Sixth Amendment right to effective assistance of counsel. The Eleventh Circuit's decision deprives Mr. Mejia of *any* remedy to redress the use of the unconstitutional conviction in deportation proceedings because, under that decision, Mr. Mejia cannot avail himself of habeas corpus to raise his constitutional claim. There is a direct and irreconcilable conflict among the Circuits, following the enactment by the Congress in 1996 of the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act.

The questions presented are:

I. Have the federal courts been stripped of their power to issue writs of habeas corpus to redress a denial of constitutional rights in deportation proceedings?

II. Does a constitutional claim arise under the Due Process Clause of the Fifth Amendment for a denial of effective assistance of counsel to an alien who has been denied an opportunity to request discretionary relief against deportation due to the derelictions of counsel?

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OPINIONS AND ORDERS BELOW

The opinion of the Eleventh Circuit, attached as Appendix A, is reported at 178 F.3d 1139 (11th Cir. 1999). The opinion of the district court, Appendix E, is unreported.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its decision on June 22, 1999, Appendix A, and denied rehearing on March 29, 2000, Appendix H. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the constitutional and statutory provisions involved in the case are set out in the appendix to this petition at Appendix I. Those provisions are:

U.S. CONST. amend. V
U.S. CONST. amend. VI
IIRIRA § 309
8 U.S.C. § 1105a
8 U.S.C. § 1182(a)(2)(A)
8 U.S.C. § 1182(c)
8 U.S.C. § 1187
8 U.S.C. § 1226
8 U.S.C. § 1251
8 U.S.C. § 1252
8 U.S.C. § 1254
8 U.S.C. § 1326
28 U.S.C. § 2241
28 U.S.C. § 2244
28 U.S.C. § 2254
28 U.S.C. § 2255
8 C.F.R. § 3.2

STATEMENT OF THE CASE

A. The Deportation Proceedings.

Mr. Mejia lawfully entered the United States from his native Honduras as a nonimmigrant visitor on November 17, 1980, when he was 15 years of age. Record on Appeal, Vol. 2 at Docket Entry 16, p.163.[1] Mr. Mejia joined his mother, who has lived and worked in Miami since her arrival in the United States in June 1966. (LA:155). In 1986, when he was 20 years of age, Mr. Mejia was charged in Florida court with trafficking in cocaine. (LA:201-02). On July 24, 1986, Mr. Mejia entered a negotiated no contest plea, after having been affirmatively advised by his lawyer and the trial judge that no immigration consequences would attach as a result of that plea. (LA:203-07). The state court withheld entry of an adjudication of guilt and imposed a one-year term of youthful-offender incarceration, to be followed by two years of community control. (LA:208). Following his completion of the term of incarceration, Mr. Mejia was granted immigration status as a nonimmigrant student, through August 1990. (LA:138).

On March 8, 1990, the Immigration and Naturalization Service (INS) served an order to show cause on Mr. Mejia, alleging that he was subject to deportation for two reasons: (1) entry into the United States without inspection by an immigration officer; and (2) a conviction for trafficking in cocaine. (LA:253). At a hearing before the immigration judge on September 6, 1990, the court learned that Mr. Mejia in fact lawfully had entered the United States. (LA:45-46).

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1. Citations to the original record on appeal, as permitted by this Court's Rule 12.7, will be referenced in the same format utilized in the Eleventh Circuit, *i.e.*, by volume number, docket entry number, and internal page number. For ease of reference, two Eleventh Circuit record entries, the notice of filing state court documents (R2:12) and the notice of filing the administrative record (R2:16), have been submitted to this Court with this petition as a "lodging appendix" and will be referenced by page number as "LA:__."

The immigration judge granted a continuance to the INS to allow for preparation of amended deportation charges against Mr. Mejia. (LA:52-53, 56, 59-60). Mr. Mejia's counsel thereafter moved the state trial court to seal the records of the criminal prosecution because the plea negotiations in the case had contemplated that Mr. Mejia "would be allowed to have his record sealed and subsequently expunged because of potential immigration problems." (LA:226-227).[2] The state trial judge granted the petition and sealed Mr. Mejia's record. (LA:251-52).

Two days after the sealing order was entered, the INS issued an amended order to show cause, seeking deportation solely on the basis that, as of August 1990, Mr. Mejia had overstayed his visa. (LA:138). At a subsequent hearing, the immigration judge ruled that Mr. Mejia was subject to deportation as an "overstay," but granted him leave to file an application for suspension of deportation. (LA:68-82).

Mr. Mejia filed his application for suspension of deportation on February 21, 1991, asserting extreme hardship to himself, as well as to his mother and sister (a United States citizen) if he were to be deported, and also noting that Mr. Mejia no longer has any family members living in Honduras. (LA:153-156). The INS moved to pretermit the application on the basis of Mr. Mejia's conviction in the state court proceedings, the withholding of adjudication and sealing of the record notwithstanding. (R2:12:Ex.2:17; LA:87). Mr. Mejia's counsel maintained that "no conviction exists" for immigration purposes. (LA:95, 107-08). Citing to a 1959 Board of Immigration Appeals (BIA) decision, the immigration judge rejected the argument and ruled that the state conviction barred Mr. Mejia from seeking a suspension of deportation. (LA:30-31, 107-08, 126-27). See Appendix G. On Mr. Mejia's appeal, the BIA upheld the

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2. The fact surrounding the plea negotiations were established through affidavits submitted by Mr. Mejia's counsel, the prosecutor, and the sentencing judge. (LA:230-36).

immigration judge's decision and also held that Mr. Mejia would have been subject to deportation based on the conviction. Appendix F.

Mr. Mejia's counsel did not seek further relief on his behalf and the INS ordered Mr. Mejia to surrender for deportation on May 12, 1995. (R2:19:Ex.C). Mr. Mejia did not appear. Appendix A at 7a.

B. The Vacatur of Mr. Mejia's State Conviction.

On May 21, 1997, Mr. Mejia (represented by his present counsel) filed a petition for writ of error *coram nobis* before the state trial court. (LA:189-93). The petition alleged that Mr. Mejia had been denied effective assistance of counsel in the state trial proceedings because his trial counsel (as well as the judge and prosecutor) had advised him that the withholding of adjudication and sealing of his records, following successful completion of the probationary term, would prevent the criminal record from being used against Mr. Mejia in deportation proceedings. (LA:190-91). By order entered on August 1, 1997, the Florida circuit court granted the petition and vacated the conviction. Appendix A at 8a. The state attorney thereafter abandoned the charges. *Id.*

C. The Eleventh Circuit's Decision.

After being taken into custody by INS on September 23, 1997, Mr. Mejia filed his habeas corpus petition on September 26, 1997. (R1:1). The district court issued its initial order denying the petition on that date. (R1:3). Mr. Mejia filed an amended petition on November 24, 1997. Appendix J. While seeking federal relief, Mr. Mejia also requested the BIA to reopen the proceedings against him because the criminal conviction that had been used to pretermit his application for suspension of deportation had been vacated by the state court. Appendix A at 8a.

Mr. Mejia's habeas corpus petition raised claims arising from the unconstitutionality of his state-court conviction:

(i) the denial of his Sixth Amendment right to effective assistance of counsel in the state court proceedings unconstitutionally tainted the immigration proceedings against him, because the collateral effect of the unlawfully-obtained conviction was to bar Mr. Mejia from seeking suspension of deportation; (ii) a denial of his right to effective counsel, as guaranteed by the Due Process Clause of the Fifth Amendment, in the deportation proceedings because his counsel had pursued a frivolous argument that the state court record did not constitute a "conviction" for immigration purposes, rather than seeking available post-conviction relief in the state courts to invalidate the conviction; and (iii) the unconstitutional impairment of Mr. Mejia's right to seek suspension of deportation, based solely upon an unlawfully-obtained state conviction, constituted a denial of due process. Appendix J. The district court summarily denied the petition, holding that Mr. Mejia's failure to seek a reopening of the immigration proceedings prior to July 31, 1996, under 8 C.F.R. § 3.23, barred habeas corpus relief. Appendix D.

On November 27, 1998, during the pendency of Mr. Mejia's appeal to the Eleventh Circuit from the order denying his habeas corpus petition, the BIA denied his motion to reopen the immigration proceedings, ruling that the motion was untimely. Appendix A at 8a-9a. Mr. Mejia filed a petition for review of that decision in the Eleventh Circuit. *Id.* at 13a. The Eleventh Circuit consolidated the two proceedings and issued a joint decision on June 22, 1999. Appendix A.[3]

The Eleventh Circuit first held that the BIA's denial of Mr. Mejia's motion to reopen as untimely barred review of his Sixth Amendment claim on the petition for review of the BIA's ruling:

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3. The court initially had issued a decision on the habeas corpus appeal on January 4, 1999. Appendix C. While Mr. Mejia's motion for rehearing, Appendix L, was pending, the court vacated the January 4 decision, Appendix B, ultimately issuing its final decision on June 22, 1999.

> Mejia has not established that the BIA abused its discretion in denying his motion to reopen and has not established that he has suffered any constitutional injury in his deportation proceedings. Mejia argues that he continues to suffer the consequences of the ineffective assistance of counsel that he received in his state criminal proceeding because his unconstitutional conviction has rendered him ineligible for suspension of deportation. According to Mejia, his ineligibility for suspension represents a continuing violation of his Sixth Amendment right to the effective assistance of counsel. Importantly, however, the BIA did not address Mejia's ineffective-assistance argument. Instead, the BIA simply rejected Mejia's attempts to reopen his deportation proceedings because Mejia's motions to reopen were filed long after the expiration of the time period for filing motions to reopen under the BIA's regulations.
>
> * * *
>
> . . . Thus, even assuming that Mejia suffered a constitutional violation in his deportation proceedings, the application of the limitations period from 8 C.F.R. § 3.2(c)(2) does not raise constitutional concerns merely because it leaves Mejia without a remedy for vindicating his assumed constitutional injury.

Appendix A at 13a-14a.

The court addressed Mr. Mejia's Fifth Amendment claim of ineffective assistance, arising from his counsel's representation in the immigration proceedings, on the merits. Appendix A at 15a.[4] Citing *Connecticut Board of Pardons v.*

4. The court did so after noting Mr. Mejia's argument that the untimely motion to reopen was also the result of his counsel's derelictions. *Id.* at 15a. The court recognized Mr. Mejia's argument (Cont'd)

Dumschat, 452 U.S. 458 (1981), the court commenced its analysis with the observation that "the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest." Appendix A at 17a. Because suspension of deportation "is an 'act of grace' committed to the 'unfettered discretion' of the Attorney General," and is "similar to an executive pardon," Appendix A at 19a (citations omitted), the court held that no alien may raise a claim of ineffective assistance under the Fifth Amendment arising from a lawyer's derelictions in connection with an application for discretionary relief:

> [A]n attorney's deficient representation does not deprive an alien of due process if the deficient representation merely prevents the alien from being eligible for suspension of deportation. An alien's chances of receiving such discretionary relief are too speculative, and too far beyond the capability of judicial review, to conclude that the alien has actually suffered prejudice from being ineligible for suspension of deportation. . . . Accordingly, we cannot hold that being ineligible for suspension of deportation as a consequence of deficient representation constitutes a violation of due process. In other words, an alien has not been deprived of "fundamental fairness" simply by being ineligible for a purely discretionary "act of grace" like suspension of deportation. The alien cannot

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(Cont'd)
that, "if not for his counsels' deficient performance in his deportation proceedings, he would have sought to vacate his sentence in state court earlier and then promptly moved to reopen his deportation before the expiration of the limitations period." *Id.* Implicitly acknowledging the logic of Mr. Mejia's position, the court stated that it would address the issue in terms of "whether deficient representation by counsel in deportation proceedings that renders an alien ineligible for suspension of deportation inflicts a constitutional injury." *Id.* at 16a.

> demonstrate prejudice, much less substantial prejudice, arising from the ineligibility for such an "act of grace" because no standards exist for a court to determine whether the executive would have granted the extraordinary relief anyway.
>
> In this case, assuming Mejia's representation during his initial deportation proceedings was deficient, this deficient representation did not deprive Mejia of due process. The only consequence of his counsel's deficient representation that Mejia alleges is that he is ineligible for suspension. As mentioned above, Mejia does not, and cannot establish that, but for his counsel's deficient representation, he would not have been ordered deported. . . .

Id. at 20a-22a.[5]

The court accordingly held that Mr. Mejia's petition for review of the BIA's order denying his motion to reopen "does not allege any constitutional infirmity arising from the BIA's denial of his motion to reopen." *Id.* at 23a. Finding that it had

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5. The court noted that its ruling is inconsistent with decisions of the Second Circuit and the Fifth Circuit in *Rabiu v. INS*, 41 F.3d 879 (2d Cir. 1994), and *Miranda-Lores v. INS*, 17 F.3d 84 (5th Cir. 1994), both of which decisions recognize an alien's right to effective assistance of counsel in connection with an application for a waiver of deportation by an individual who is subject to deportation after having been convicted of a designated felony. Appendix A at 20a-21a n.8. The court rejected the rationale of these decisions and also sought to distinguish them as having addressed "waiver of deportation which, unlike suspension of deportation, is available to only lawful permanent residents of the United States who have a greater expectancy of remaining in the United States than aliens, like Mejia, who are not lawful permanent residents," and because Mr. Mejia — who never received a hearing before the INS or the district court on the merits of his claim for suspension of deportation — had "not made a 'strong showing' of an 'exceptional . . . hardship' " that would entitle him to a suspension of deportation. *Id.*

"considered all of Mejia's claims through his petition for review, particularly his ineffective-assistance claim," the court dismissed as moot Mr. Mejia's appeal from the order denying his habeas corpus petition. *Id.* at 11a, 23a.

REASONS FOR GRANTING THE WRIT

I.

THE QUESTION WHETHER HABEAS CORPUS SURVIVES AFTER THE ENACTMENT OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT IS THE SUBJECT OF CONFLICTING DECISIONS AMONG THE CIRCUITS AND SHOULD BE RESOLVED BY THIS COURT.

The question left open by this Court in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), *i.e.*, whether habeas corpus remains available following the 1996 enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 525 U.S. at 480 n.7, is squarely presented by the Eleventh Circuit's decision in this case. The Eleventh Circuit, joined recently by the Fifth Circuit, *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000), has been at the forefront of a minority of the Courts of Appeals that have applied various provisions of IIRIRA sharply to constrain — if not completely to *eliminate* — the habeas corpus jurisdiction of the federal courts over constitutional claims arising from immigration proceedings. *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 1529 (2000). Here, the Eleventh Circuit has carried this interpretation of IIRIRA, and its belief that the Congress has the constitutional power implicitly to repeal habeas corpus under 28 U.S.C. § 2241, to yet a more extreme length. That is, Mr. Mejia, despite admittedly having raised a Sixth Amendment claim, arising from a state court's *adjudication* that a conviction used to his undeniable disadvantage in immigration proceedings was unconstitutionally obtained, has been denied *any* review of the

merits of that claim on habeas corpus. The stark conflict among the Circuits is thus brought more clearly into focus, and so, concomitantly, is the propriety of this Court's review.

A. The Conflict Among the Circuits.

1. Overview.

In *Richardson*, the same panel of the Eleventh Circuit that decided this case held that the repeal of habeas corpus under former Section 106(a)(10) of the Immigration and Nationality Act (INA) by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the so-called "zipper clause" enacted by IIRIRA in INA § 242(b)(9), served to abolish habeas corpus under 28 U.S.C. § 2241. 180 F.3d at 1313-15.[6] Virtually all of the other Circuits have rejected *Richardson's* reading of IIRIRA, holding that, in the absence of an explicit repeal of Section 2241 by the Congress, such as would satisfy the standards enunciated by this Court in *Felker v. Turpin*, 518 U.S. 651, 660 (1996), habeas corpus survives IIRIRA. *E.g.*, *Flores-Miramontes v. INS*, __ F.3d __, 2000 WL 558024 (9th Cir. May 9, 2000); *Liang v. INS*, 206 F.3d 308, 316-21 (3d Cir. 2000); *Ho v. Greene*, 204 F.3d 1045, 1051-52 (10th Cir. 2000). These decisions follow in the footsteps — and apply the rationale — of the uniform precedent holding that habeas corpus is available under the "transitional" provisions of Section 309(c)(4) of IIRIRA, which provisions apply to final orders of deportation entered after October 31, 1996, in proceedings commenced by the INS prior

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6. The court's original decision in the *Richardson* case, *Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998), *cert. granted and judgment vacated*, 526 U.S. 1142 (1999), held that INA § 242(g) had "expressly repeal[ed] any and all jurisdiction except that conferred by INA § 242," including habeas corpus jurisdiction. 162 F.3d at 1358-59. Following this Court's decision in *American-Arab*, in which the Court commanded a restrictive reading of INA § 242(g), and the remand in *Richardson*, see *Richardson v. Reno*, 526 U.S. 1142 (1999), for reconsideration in light of *American-Arab*, the Eleventh Circuit brought forth the analysis set forth in the text. *Alanis-Bustamante v. Reno*, 201 F.3d 1303, 1307 n.8 (11th Cir. 2000) (recapitulating *Richardson*).

to April 1, 1997 (the effective date of IIRIRA). *E.g.*, *Bowrin v. INS*, 194 F.3d 483, 488-89 (4th Cir. 1999); *Shah v. Reno*, 184 F.3d 719, 720-22 (8th Cir. 1999); *Mustata v. U.S. Department of Justice*, 179 F.3d 1017, 1020 (6th Cir. 1999); *Sandoval v. Reno*, 166 F.3d 225, 236-38 (3d Cir. 1999); *Henderson v. INS*, 157 F.3d 106, 117-22 (2d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Goncalves v. Reno*, 144 F.3d 110, 122 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Ramallo v. Reno*, 114 F.3d 1210, 1214 (D.C. Cir. 1997), *cert. denied*, 526 U.S. 1003 (1999).

2. IIRIRA's "transitional" provisions.

All of the cited cases addressing the effect of Section 309(c)(4) arose from the bar on judicial review of deportation orders in "transitional cases" if the deportation order was based on the alien's conviction of one or more identified criminal offenses. IIRIRA, § 309(c)(4)(G). Either before *American-Arab, e.g.*, *Goncalves v. Reno*, 144 F.3d at 122, or following this Court's restrictive reading of Section 242(g) in that decision, *e.g.*, *Bowrin v. INS*, 194 F.3d at 488-89, the Courts of Appeals held that habeas corpus was available, Section 309(c)(4)(G) notwithstanding, for review of claims arising from the AEDPA bar on waivers of deportation under former Section 212(c) of the INA for aliens convicted of certain enumerated criminal offenses. The rationale for this construction was elucidated by the First Circuit:

> [T]he Attorney General argues that new INA § 242(g), the exclusivity provision, can be read to imply a repeal of § 2241 even without a specific reference. She argues that new INA § 242(g) provides that "notwithstanding any other provision of law, no court shall have jurisdiction" "except as provided in this section," *i.e.*, new INA § 242, and so there is no need specifically to repeal § 2241. The new INA § 242, argues the Attorney General, is the only source of jurisdiction in immigration

> cases. Thus, it would require a specific reference to § 2241 to preserve such jurisdiction, rather than a specific reference to abolish it.
>
> This argument leads us to apply the long standing rule disfavoring repeal of jurisdictional provisions by implication, a rule which is particularly appropriate here. Although the breadth of the "notwithstanding" clause is sweeping, a reading which provided for no exceptions would have enormous consequences that are contrary to clearly expressed congressional intent. If the "notwithstanding" clause of subsection (g) is read to preclude any jurisdiction except that specifically authorized in new INA § 242, then that conflicts with IIRIRA § 309. Judicial review would be blocked not only for the narrow class of aliens in Goncalves' position, but for every alien subject to IIRIRA's "transitional rules." As new INA § 242 is only applicable for aliens subject to IIRIRA's "permanent rules," see IIRIRA § 309, and as new INA § 242(g) is applicable immediately, see IIRIRA § 306(c), aliens subject to the transitional rules — *i.e.*, every alien now in the administrative process whose case began prior to April 1, 1997 — could not obtain any judicial review because they cannot take advantage of this section, *i.e.*, new INA § 242. Such a reading would clearly conflict with the congressional intent expressed in IIRIRA § 309 to preserve review in the transitional period under old INA § 106.

Goncalves v. Reno, 144 F.3d at 122 (citations omitted).[7]

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7. The court also noted that its declination of the government's invitation to find a repeal of Section 2241 "eliminates the need to address serious, novel and complex constitutional issues" that would be presented by a repeal of Section 2241. *Id.* at 122-23.

Following *American-Arab*, the Fourth Circuit adopted the rationale enunciated in *Goncalves* and, analyzing the transitional rules similarly held, in *Bowrin v. INS*, that habeas corpus survives:

> District court jurisdiction over habeas corpus petitions, like Bowrin's, . . . is not prohibited by § 1252(g) because it is inapplicable to final deportation orders.
>
> If § 1252(g) does not govern our review of Bowrin's § 2241 habeas petition, then what does? The transitional rules of the IIRIRA, specifically § 309(c)(4)(G). As previously stated, because he was already involved in deportation proceedings when the IIRIRA took effect on April 1, 1997, Bowrin's petition is subject to the transitional rules. Subsection G provides that "there shall be no appeal permitted in the case of an alien who is . . . deportable by reason of having committed" certain enumerated criminal offenses, a list including that for which Bowrin has been convicted. . . .
>
> . . . Although Bowrin filed a direct appeal over which we have already determined we lack jurisdiction, he also filed a petition for writ of habeas corpus in the district court, which is the only issue remaining before us. IIRIRA § 309(c)(4)(G) does not mention habeas corpus petitions under § 2241, nor does it appear to preclude district court jurisdiction over such habeas petitions. We do not believe, therefore, that the preclusion of jurisdiction over an alien's direct appeal applies to prohibit general habeas jurisdiction in the district court pursuant to § 2241.
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> * * *
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> . . . [W]e join several of our sister circuits in holding that, absent express congressional intent in the

> language of either the AEDPA or the IIRIRA to eliminate the general federal habeas corpus review . . . the remedy remains available to Bowrin and other aliens similarly situated.

Id. at 488-89 (citations omitted); *accord, e.g., Tasios v. Reno*, 204 F.3d 544, 546-47 (4th Cir. 2000); *Jurado- Gutierrez v. Greene*, 190 F.3d 1135, 1145-46 (10th Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 1539 (2000).[8]

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8. In *Mayers v. INS*, 175 F.3d 1289, 1299-300 (11th Cir. 1999), the Eleventh Circuit aligned itself with the precedent cited in the text. *Accord, Alanis-Bustamante v. Reno*, 201 F.3d at 1307-08. In *Richardson v. Reno*, the Eleventh Circuit limited *Mayers* to "transitional" cases, holding that Section 2241 habeas corpus has been abolished in immigration cases arising after April 1, 1997. 180 F.3d at 1315-16 & n.6. It is not clear whether the Eleventh Circuit regarded Mr. Mejia's case as governed by the transitional or the final IIRIRA rules. Mr. Mejia's final deportation order was entered on January 12, 1994. Appendix F. Using this order as the determinative event, Section 309(c) of IIRIRA, which provision states that, as to "an alien who was in exclusion or deportation proceedings," as of the effective date of IIRIRA on April 1, 1997, "the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments," would not apply to Mr. Mejia. On the other hand, if the order denying the motion to reopen is treated as the equivalent of a final order of deportation, Mr. Mejia might be able to demand that the BIA order be reviewed under the "transitional" regime. The government, in striving to shoehorn Mr. Mejia into the "transitional" rules, took the position that "[t]he denial of Mejia's motion to reopen . . . while not literally a 'final order of deportation,' falls within the ambit of 'final orders of deportation.' " Supplemental Brief for Respondent, *Mejia v. Reno*, 11th Circuit Nos. 98-4426 & 98-5878, at 5. Even if the government could succeed in this effort, of course, it is only the order denying Mr. Mejia's motion to reopen, which motion did not include — and, as will be set forth *infra*, could not have included — his Sixth Amendment claim, that would be subject to "transitional" review procedures. In any event, there is a conflict among the circuits on this point as well. *Compare Lerma de Garcia v. INS*, 141 F.3d 215, 216 (5th Cir. 1998) (reviewing post-April 1997 order denying motion to reopen in proceeding that was

(Cont'd)

Only the Seventh Circuit appears to have rejected the availability of habeas corpus in "transitional" cases, holding that some form of *direct* review in the courts of appeals survives IIRIRA and AEDPA, but that habeas corpus might be available "if for reasons beyond the alien's control he could not have raised his substantial constitutional issue in this court." *LaGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998), *cert. denied*, __ U.S. __, 120 S. Ct. 1157 (2000); *accord*, *Morales-Ramirez v. Reno*, 209 F.3d 977, 978-81 (7th Cir. 2000); *Singh v. Reno*, 182 F.3d 504, 508-09 (7th Cir. 1999). The conflict among the Circuits, however, has become yet sharper and more well-defined as the federal courts have grappled with the *permanent* rules for judicial review under IIRIRA.

3. IIRIRA's permanent provisions.

The Eleventh Circuit, as previously noted, reads the "zipper clause" of INA § 242(b)(9), "along with the overall revisions to the judicial review scheme" in IIRIRA to "constitute a sufficiently broad and general limitation on federal jurisdiction to preclude § 2241 jurisdiction over challenges to removal orders." *Richardson v. Reno*, 180 F.3d at 1315.[9] The Fifth Circuit

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(Cont'd)
otherwise complete in 1994) *with Wright v. Ouellette*, 171 F.3d 8, 11-12 (1st Cir. 1999) (motion to reopen does not affect the finality of a deportation order under *Stone v. INS*, 514 U.S. 386 (1995), and "is more akin to starting a new proceeding" than it is to a *continuation* of a previous proceeding, particularly when based upon new evidence). The Eleventh Circuit expressly elected not to resolve this issue on Mr. Mejia's appeal, Appendix A at 12a-13a, but it thereafter held in *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999), that orders denying motions to reopen are simply *unreviewable* by the federal courts. *Accord*, *Prado v. Reno*, 198 F.3d 286, 292 (1st Cir. 1999). The Ninth Circuit recently held to the contrary. *Socop-Gonzalez v. INS*, 208 F.3d 838, 843-44 (9th Cir. 2000).

9. The habeas corpus petition in *Richardson* challenged *only* the alien's *detention* pending disposition of the deportation proceedings (Cont'd)

adopted the *Richardson* holding in *Max-George v. Reno*, holding that "[t]he clear language of IIRIRA's permanent rules" has eliminated Section 2241 habeas corpus jurisdiction. 205 F.3d at 198.[10]

Every other Circuit that has addressed this issue under the permanent rules has *rejected* the view espoused in *Richardson* and *Max-George*. The Third Circuit, in *Liang v. INS*, applied the rationale of the precedent addressing habeas corpus under the "transitional" rules to hold that neither the "zipper clause," INA § 242(b)(9), nor any other permanent provision of IIRIRA, repeals Section 2241:

> There is no reason why the jurisdictional ruling in this case under the permanent rules should be any different than that we reached under the transitional rules. Although the text of these provisions differs

(Cont'd)
brought against him, 180 F.3d at 1314-15, rather than, as here, a constitutional challenge *to the deportation proceedings*. The Eleventh Circuit noted that there was no necessity to reach the question whether the unavailability of habeas corpus under § 2241 would raise issues under the Suspension Clause of Article I, Section 9, of the United States Constitution because Richardson retains the right to seek judicial review following the issuance of a final deportation order. 180 F.3d at 1315. Here, as will be set forth *infra*, Mr. Mejia has *never* received judicial review of his Sixth Amendment claim — and, under the Eleventh Circuit's decision, he never will.

10. The Fifth Circuit acknowledged that its construction of IIRIRA "implicates the guarantee that the 'Privilege of the Writ' preserved by the Constitution cannot be suspended" under Article I, Section 9. 205 F.3d at 201. Like the Seventh Circuit, the Fifth Circuit created a right for "criminal aliens," who are expressly barred from seeking direct review in the courts of appeal, to seek such direct review on constitutional grounds. *Id.* at 202-03. Only "constitutional" habeas corpus is deemed by the Fifth Circuit to have survived IIRIRA, *id.* at 202-03, and the Fifth Circuit frankly noted its view that, "unless a petitioner proves that his or her claims are within the habeas writ constitutionally protected (a situation which . . . is unlikely)," no form of habeas corpus remains. *Id.*

> somewhat from the sections of the transitional rules . . . those sections . . . used language comparably comprehensive. . . .
>
> The difficulty with the government's effort to convince us that the language of § 242(b)(9), or of any of the permanent rules, requires a different result . . . is that no language in the permanent rules fills the gap. . . . None of the provisions, including INA § 242(b)(9), expressly refers to habeas jurisdiction or to 28 U.S.C. § 2241. None expressly revokes habeas jurisdiction.
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> * * *
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> The holding of the Supreme Court is clear. A repeal of habeas jurisdiction can only be effected by express congressional command. . . . That holding is as applicable to the permanent rules as it was to the transitional rules. . . .

206 F.3d at 317 (citations omitted).

Invoking *Felker v. Turpin* and its predecessor, *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868), the Third Circuit rejected *Richardson* and *Max-George*:

> The holdings of both *Richardson* cases and *Max-George* that Congress need not mention habeas or § 2241 to repeal the district courts' habeas jurisdiction are at odds ... with the reasoning of the other courts of appeals that have read the Supreme Court's precedent in *Yerger* and *Felker* to require explicit statutory reference to habeas or § 2241 to effect congressional repeal of habeas jurisdiction.
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> * * *
>
> . . . We continue to believe that had Congress intended to eliminate all habeas jurisdiction under § 2241, it would have done so by making its intent

> explicit in the language of the statute. Furthermore, . . . this approach obviates the serious constitutional problems that would arise were we to . . . read the permanent rules to strip the district courts of habeas jurisdiction.

Id. at 320-21 (citations omitted); *accord, e.g., Flores-Miramontes v. INS; Ho v. Greene*, 204 F.3d at 1050-51.[11]

The conflict among the Circuits is sharply drawn and indisputable. The disparate treatment of aliens seeking to raise claims in habeas corpus will continue absent review by this Court.

B. Mr. Mejia's Thwarted Right to Review of His Constitutional Claims.

The violation of Mr. Mejia's Sixth Amendment right to the effective assistance of counsel in a criminal case is established beyond dispute by the state court's unchallenged ruling that Mr. Mejia was indeed denied effective assistance because his counsel (as well as the state judge and prosecutor) affirmatively misled him as to the immigration consequences of his no contest plea and the order withholding adjudication entered thereon.[12]

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11. The First Circuit, the court that blazed the trail in interpreting the transitional rules, *Goncalves v. Reno*, 144 F.3d at 122, has not yet spoken to the permanent rules. In a recent decision, the District of Massachusetts looked to the Third Circuit's decision in *Liang* and, after reviewing the First Circuit's transitional precedents, concluded that the holding in *Liang* is consistent with *Goncalves* and that the rationale of that decision "is equally applicable to review under the permanent rules." *Vasquez v. Reno*, __ F. Supp. 2d __, 2000 WL 620200 at *3-4 (D. Mass. Apr. 21, 2000).

12. A denial of effective assistance of counsel in plea proceedings, which denial results in prejudice to the defendant, invalidates the resulting conviction under the Sixth and Fourteenth Amendments. *Hill v. Lockhart*, 474 U.S. 52, 56-59 (1985). Providing affirmative misinformation as to the immigration-related consequences of a plea constitutes ineffective assistance of counsel under federal and Florida law. *Downs-Morgan v. United States*, 765 F.2d 1534, 1538-42 (11th Cir. 1985); *State v. Sallato*, 519 So. 2d 605, 606 (Fla. 1988).

The unconstitutionally-obtained conviction provided the *sole* basis for pretermitting Mr. Mejia's application for suspension of deportation.[13] The Eleventh Circuit's *refusal* to allow Mr. Mejia to pursue the Sixth Amendment claim on habeas corpus has deprived Mr. Mejia of *any* judicial review of this claim.

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13. Indeed, the *actual* consequences of the unconstitutional conviction extend somewhat beyond disentitling Mr. Mejia to seek a suspension of deportation. The original deportation charge against Mr. Mejia was based in part on the conviction, and the only *other* basis for deportation alleged in the original charges was that Mr. Mejia had entered the United States without inspection by an immigration officer — a charge that was ultimately dropped because, without dispute, Mr. Mejia *lawfully* entered the United States in 1980. (LA:253; LA:45-46). While the original charges were pending, however, Mr. Mejia's student visa, which had been effective through August 1990, expired and the INS thereafter abandoned the original charges, electing to proceed against Mr. Mejia *only* as an "overstay," *i.e.*, Mr. Mejia, having remained in the United States while fighting the original charges, thus unwittingly provided the INS with an *independent* — and irrefutable — basis for deporting him. The unfairness of this scenario, whereby the mere act of resisting an erroneous deportation charge engenders yet *another* basis for deportation, has been remarked upon by at least one court. *Westover v. Reno*, 202 F.3d 475, 482 & n.7 (1st Cir. 2000) (criticizing "the practice of charging aliens with overstaying when they remain in the United States to defend themselves in removal proceedings" because aliens' due process rights include "a meaningful opportunity to be heard" and because "[t]he real danger of this practice is that it could be used to remove an alien on weak or even false original charges as long as the alien's visa will expire during removal proceedings") (citations omitted), *pet. for cert. filed*, No. 99-1777(May 8, 2000). Here, the INS's tactics served, albeit by mere happenstance, to perpetuate the taint of the unconstitutional conviction. But for the existence of that conviction, it is unlikely that Mr. Mejia would have attracted the attention of the INS and there would have been no necessity for him to oppose deportation. Moreover, the prejudicial effect of the prior conviction extended to the BIA's decision to uphold the immigration judge's ruling: the BIA expressly noted that the existence of the conviction would have been sufficient to deport Mr. Mejia *regardless* of the overstay charge. Appendix F.

The Eleventh Circuit's unwillingness to allow habeas review of the Sixth Amendment claim appears to be based on the court's belief that the claim could be addressed by the court on review of the BIA's order denying Mr. Mejia's motion to reopen as untimely filed. Appendix A at 11a.[14] Upon holding that the BIA had "correctly concluded that Mejia's motions were untimely" under 8 C.F.R. § 3.2(c)(2), the court held that, "even assuming that Mejia suffered a constitutional violation in his deportation proceedings, the application of the limitations period . . . does not raise constitutional concerns merely because it leaves Mejia without a remedy for vindicating his assumed constitutional injury." Appendix A at 13a-14a. The effect of this holding is to deny Mr. Mejia review of a Sixth Amendment claim *solely* because the BIA did not consider the claim — when, without dispute, the BIA *was never asked* to consider the claim because *it has no jurisdiction* to review federal constitutional issues.

14. The opinion of the Eleventh Circuit states Mr. Mejia's position as being that, "if he is afforded a full review on his petition for review, this Court need not address his appeal of the district court's dismissal of [his] section 2241 petition." Appendix A at 11a. What Mr. Mejia argued, in his post-*American-Arab* supplemental brief, was that the Eleventh Circuit's first *Richardson* decision was no longer valid after *American-Arab* (a point that the court later conceded in the second *Richardson* decision) and that Mr. Mejia should be allowed to pursue his constitutional claims on habeas corpus. See Supplemental Brief of Petitioner-Appellant, *Mejia v. Reno*, 11th Circuit Nos. 98-4426 & 98-5878, at 18-27. Alternatively, Mr. Mejia suggested that, should the Eleventh Circuit not be inclined to revisit its initial *Richardson* decision, the court could elect "to allow full judicial review of Mr. Mejia's constitutional claims on his petition for review of the BIA's order denying his motion to reopen," *id.* at 27-28, following the lead of the Seventh Circuit in *LaGuerre v. Reno*, 164 F.3d at 1040. If, however, the purported untimeliness of the motion to reopen should "result in his constitutional claims not being heard on the merits" on administrative review, Mr. Mejia asserted that such review would be neither an adequate nor an effective alternative remedy that would displace habeas corpus under *Swain v. Pressley*, 430 U.S. 372 (1977), and that the Eleventh Circuit would be bound in that event to allow him to proceed on habeas corpus. Supplemental Brief of Petitioner-Appellant at 27-28.

Mr. Mejia's motion to reopen before the BIA *did not raise the Sixth Amendment claim.* (R:1:1:7). Instead, Mr. Mejia based his motion on the vacatur of the underlying state conviction and sought leave to reopen the deportation proceedings so that he might have an opportunity to go forward on his application for suspension of deportation. *Id.*[15] No claim was raised under the Sixth Amendment because, while the BIA is empowered to address "administratively correctable procedural errors, even when these errors are failures to follow due process," *Liu v. Water*, 55 F.3d 421, 426 (9th Cir. 1995), the BIA does not otherwise have jurisdiction "to adjudicate *constitutional* issues." *Vargas v. INS*, 831 F.2d 906, 908 (9th Cir. 1987). It is an apothegm that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures." *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *accord, e.g., Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994). Thus, while administrative agencies "may consider constitutional claims," such agencies "lack the authority to deal with them dispositively" because "the final say on constitutional matters rests with the courts," and the BIA cannot address purely constitutional claims. *Singh v. Reno*, 182 F.3d at 510 (citations omitted); *accord, e.g., Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993).

Mr. Mejia's *Sixth Amendment* claim does not arise from an "administratively correctable procedural error" in the *immigration proceedings*, but rather from the *state criminal proceedings* that resulted in his unconstitutional conviction. The critical distinction that must be drawn is between the conduct of Mr. Mejia's counsel in the deportation proceedings, which is a matter that may be addressed in the first instance by the BIA (as will be discussed *infra*), and

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15. Under existing precedent, the vacatur of the state conviction constitutes grounds under 8 C.F.R. § 3.2(c)(1) for reopening a deportation proceeding. *E.g., DeFaria v. INS*, 13 F.3d 422, 423 (1st Cir. 1993).

the question whether the use of an unconstitutionally-obtained state conviction in immigration proceedings violates the Sixth Amendment. The latter question is one of constitutional dimension only, and the BIA had no authority to address it.[16]

The conflict among the Circuits as to the continuing viability of Section 2241 habeas corpus (or so-called "constitutional" habeas corpus) is thus drawn clearly into focus by Mr. Mejia's case. Bereft of any other available remedy to challenge the constitutionality of an immigration proceeding that was tainted by an unconstitutionally-obtained state conviction, Mr. Mejia has been denied access to the writ of habeas corpus by the Eleventh Circuit's holding.

From its earliest incarnation, the writ of habeas corpus has existed to protect against unlawful executive confinement. *E.g.*, *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807). The Eleventh Circuit's refusal to allow Mr. Mejia to have access to the Great Writ warrants this Court's review.

II.

THE CONFLICT AMONG THE CIRCUITS ON THE QUESTION WHETHER A CONSTITUTIONAL ERROR THAT DEPRIVES AN INDIVIDUAL OF THE RIGHT TO SEEK DISCRETIONARY EXECUTIVE RELIEF FROM DEPORTATION GIVES RISE TO A FEDERAL CLAIM FOR RELIEF SHOULD BE REVIEWED BY THIS COURT.

A. The Conflict of Decisions.

Mr. Mejia's Fifth Amendment due process claim was addressed on the merits by the Eleventh Circuit. Appendix

16. At no point in the proceedings before either the district court or the Eleventh Circuit did the government *ever* suggest that the BIA had the authority to consider Mr. Mejia's Sixth Amendment claim — much less that the BIA ever did so.

A at 16a.[17] The essence of the court's holding is that Mr. Mejia cannot state a viable claim for relief because "the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest," such that "we cannot hold that being ineligible for suspension of deportation as a consequence of deficient representation constitutes a violation of due process." *Id.* at 17a-20a.

The Eleventh Circuit recognized that its decision conflicts with the Second Circuit's decision in *Rabiu v. INS*, 41 F.3d 879 (2d Cir. 1994), and the Fifth Circuit's decision in *Miranda-Lores v. INS*, 17 F.3d 84 (5th Cir. 1994). Appendix A at 20a n.8. In *Rabiu*, the Second Circuit held that a claim of ineffective assistance of counsel arises from an attorney's failure timely to request a waiver of deportation under former Section 212(c) of the INA. 41 F.3d at 882-83. Similarly, in *Miranda-Lores*, the Fifth Circuit held to the same effect, considering on the merits a claim of ineffective assistance of counsel arising from an attorney's failure timely to request Section 212(c) relief. 17 F.3d at 84-85. The Third Circuit, in *Green v. INS*, 46 F.3d 313 (3d Cir. 1995), also so held. *Id.* at 320.

B. The Eleventh Circuit's Flawed Constitutional Rationale.

The Eleventh Circuit sought to dissipate the conflict, primarily faulting the Second and Fifth Circuits (and presumably the Third Circuit as well) for not taking into consideration this Court's decision in *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981). Appendix A at 20a n.8. The claim in *Dumschat*, however, was that the state pardon board purportedly had created a constitutional liberty interest that required the board to explain its reasons for denying an application for

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17. The irony in the court's approach is remarkable. While declining to review Mr. Mejia's *Sixth Amendment* claim because the BIA denied his motion to reopen as untimely, in a ruling that ignores the inability of the BIA even to have addressed the claim, the Eleventh Circuit addressed on the merits Mr. Mejia's *Fifth Amendment* claim, despite the BIA's procedural ruling.

commutation of a life sentence. *Id.* at 459. This Court rejected the claim, holding that no such liberty interest existed, *id.* at 460-66, and, in the penultimate paragraph of its decision, stated: "We hold that the power vested in the Connecticut Board of Pardons to commute sentences conferred no rights on respondents *beyond the right to seek commutation.*" *Id.* at 467 (emphasis supplied). In other words, the Connecticut inmates had no right to a particular *result* — but they had the right to *seek* a commutation. *Dumschat* simply does not support the holding of the Eleventh Circuit that an alien who is denied the opportunity to *seek* suspension of deportation because of ineffective assistance of counsel cannot raise a Fifth Amendment claim.

Secondly, the Eleventh Circuit sought to distinguish the conflicting decisions because "both *Rabiu* and *Miranda-Lores* involved waiver of deportation which, unlike suspension of deportation, is available to only lawful permanent residents of the United States who have a greater expectancy of remaining in the United States than aliens, like Mejia, who are not lawful permanent residents." Appendix A at 20a n.8. What the court appears to be saying is that the level of due process that must be extended to individuals such as Mr. Mejia, who are lawfully within the United States at the time deportation charges are brought against them (in Mr. Mejia's case, on a nonimmigrant student visa) are entitled to *less* due process of law than lawful permanent residents whom the government seeks to deport as "criminal aliens." This Court's consistent and emphatic statements on the due process rights of persons whom the government seeks to expel by deportation cannot be squared with the Eleventh Circuit's purported due process "distinction."

It has been established since the era of *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), and *Wong Wing v. United States*, 163 U.S. 228, 238 (1896), that aliens who are within the United States are entitled to due process of law and that "[e]ven one whose presence in the country is unlawful, involuntary, or transitory" is entitled to that constitutional protection. *Matthews*

v. Diaz, 426 U.S. 67, 77 (1976) (citations omitted). Simply stated, "the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993) (citation omitted).[18] "The language of the due process clause refers to 'persons,' not 'citizens,' and it is well established that aliens within the territory of the United States may invoke its provisions." *Zadvydas v. Underdown*, 185 F.3d 279, 289 (5th Cir. 1999).

The Eleventh Circuit's attempts to blur the sharp conflict between its holding that no claim of ineffective assistance arises from a lawyer's derelictions in seeking discretionary relief from deportation, and the contrary holdings of the Second, Third and Fifth Circuits on this precise point are unavailing.[19] Moreover,

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18. Indeed, even individuals who are without *any* lawful immigration status in the United States are not cut off from the protections of Fifth Amendment due process. *E.g.*, *Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206, 212 (1953) ("aliens who have once passed through our gates, *even illegally*, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law") (emphasis supplied). "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The constitutionally-permissible distinction is between persons who are *within the borders* of the United States and those who are *seeking admission* to this country (even if they are physically present within the borders at the time of the request). *E.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Mezei*, 345 U.S. at 213; *Ho v. Greene*, 204 F.3d at 1058-59. This Court has never suggested that the quality of due process to which an individual is entitled depends upon the nature of their *lawful* status in this country at the time that the INS seeks a deportation order.

19. In a final aside, the Eleventh Circuit stated that, "even under *Rabiu* and *Miranda-Lores*, it does not appear that Mejia would be able to establish an ineffective-assistance claim" because he "has not made a 'strong showing' of an 'exceptional . . . hardship' and thus has not shown 'prejudice' — let alone 'substantial prejudice' — arising from his attorneys' deficient performance." Appendix A at 20a n.8. Mr. Mejia,

(Cont'd)

the underlying rationale for the Eleventh Circuit's holding — that due process does not protect an alien who is deprived of an opportunity to seek "a purely discretionary 'act of grace' like suspension of deportation," Appendix A at 20a — conflicts with this Court's precedent and has engendered yet further conflict among the Circuits.

(Cont'd)
of course, has *never been afforded a hearing* -- either before the immigration judge or in the habeas corpus proceedings — on his entitlement to seek a suspension of deportation. The immigration judge granted Mr. Mejia leave to file a suspension application, but then refused even to consider it because of the then-extant conviction. The district court never conducted a hearing on Mr. Mejia's petition. It is, accordingly, somewhat unfair to fault Mr. Mejia for purportedly not establishing that which he has never been given an opportunity to show. Moreover, Mr. Mejia's papers before the district court allege a strong case for suspension of deportation: (i) Mr. Mejia entered the United States lawfully in November 1980 at the age of 15 years; (ii) his mother has lived and worked in Miami since 1966 and the remainder of his family has resided in this country since their arrival from Honduras in 1973 (with the exception of a brother who resides in Guatemala); (iii) Mr. Mejia attended public schools in Miami, graduating from high school in 1984; (iv) after completing his youthful-offender term of incarceration, Mr. Mejia secured a junior college degree and maintained a consistent employment record; and (v) since the time that his application was pretermitted, Mr. Mejia married the former Maria de los Angeles Salcines, a native American citizen, and has also maintained steady employment. (LA:153-55). The *Rabiu* decision imposes on the individual asserting an ineffectiveness claim to show that "he would have been eligible for relief and that he could have made a strong showing in support of his application." *Rabiu*, 41 F.3d at 882. In that case, the movant showed that he had resided in the United States for 15 years and had both "substantial family ties to the United States" and "a long history of employment," a showing that the Second Circuit described as "a *prima facie* showing that he would have been eligible for relief" from deportation. *Id.* at 883. The record before the Eleventh Circuit is, at the very least, as strong as that which led the Second Circuit to find a valid claim of ineffective assistance.

C. Constitutional Protection for the Right to Seek Discretionary Relief from Deportation.

In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), this Court considered a challenge to the INS's refusal to grant suspension of deportation, purportedly based on the petitioner's inclusion on a list of individuals whom the government wished to deport. The Court, cautioning that it was not "reviewing and reversing the manner in which discretion was exercised," held that a grant of habeas relief would allow the petitioner an opportunity to *seek* suspension of deportation, an opportunity that the Court deemed sufficient to accord due process to the petitioner. *Id.* at 268. This holding is consistent with the distinction between the right to *seek* suspension and the ultimate relief on an application therefor. *Jay v. Boyd*, 351 U.S. 345, 353 (1956).

The question whether an alien has received due process of law is, of course, one vested within the unique authority of the federal courts. *E.g.*, *Luis v. INS*, 196 F.3d 36, 41 (1st Cir. 1999). Included therein is the power to determine whether an attorney's derelictions denied an alien due process of law. *E.g.*, *Mustata v. U.S. Department of Justice*, 179 F.3d at 1021-23; *Lozada v. INS*, 857 F.2d 10, 13-14 (1st Cir. 1988).

That an attorney's derelictions in connection with an application for discretionary relief thus can give rise to a claim of ineffective assistance under the Fifth Amendment has been recognized since the decision *Lozada v. INS*, 857 F.2d at 11-12. That a constitutional claim, cognizable on habeas corpus, can arise from a denial of an opportunity to *seek* discretionary relief in the first instance has been taken as a given by *every* court of appeals that has passed on the retroactive application of AEDPA § 440(d), the provision that abolished waivers of deportation under former INA § 212(c) for aliens who are subject to deportation based upon convictions of certain criminal offenses. *E.g.*, *Magana-Pizano v. INS*, 200 F.3d 603, 611 (9th Cir. 1999); *Pak v. Reno*, 196 F.3d 666, 675 (6th Cir. 1999); *Wallace v. Reno*,

194 F.3d 279, 285-86 (1st Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d at 1150-51; *Sandoval v. Reno*, 166 F.3d 225, 239-40 (3d Cir. 1999); *Henderson v. INS*, 157 F.3d at 128-29. The determinative rationale of the Eleventh Circuit's decision, if applied to the discretionary waivers of deportation at issue in these cases, would have rendered it entirely *unnecessary* for the courts ever to have reached the question whether the bar enacted in AEDPA § 440(d) should apply retroactively — because, in the final analysis, the question whether a particular alien would *receive* a discretionary waiver is unknowable.

The other circuits, however, plainly recognize that, in determining the availability of habeas corpus relief, "[i]t is of no consequence . . . that "[the] relief is discretionary." *Tasios v. Reno*, 204 F.3d 544, 552 (4th Cir. 2000). As the First Circuit expressly held in *Goncalves v. Reno*, rejecting precisely the reasoning adopted by the Eleventh Circuit in this case:

> We address one final argument in favor of the Attorney General. The Attorney General contends that, because she has discretion to grant or deny this relief from deportation in any event, her decision concerning Goncalves' statutory eligibility for this form of relief is itself not reviewable on habeas. We disagree. *Analytically, the decision whether an alien is eligible to be considered for a particular discretionary form of relief is a statutory question separate from the discretionary component of the administrative decision whether to grant relief.*

144 F.3d at 125 (citation omitted; emphasis supplied). "[T]he broad discretion of the political branches in immigration matters" cannot be invoked to defeat an individual's thwarted right to *request* discretionary relief from deportation. *Id.*

The First Circuit has noted the conflict between the Eleventh Circuit's decision in Mr. Mejia's case and the First Circuit's precedent. *Bernal-Vallejo v. INS*, 195 F.3d 56, 64-65 (1st Cir. 1999). The Fifth Circuit, on the other hand, has indicated its

approval of the holding that "the denial of discretionary relief does not rise to the level of a constitutional violation, even if [the petitioner] had been eligible for it." *Finlay v. INS*, 210 F.3d 556, 557 (5th Cir. 2000); *accord*, *Toscano-Gil v. Trominski*, 210 F.3d 470, 474 n.5 (5th Cir. 2000) (quoting Eleventh Circuit holding that "failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest"). Once again, the conflict is stark and undeniable, the potential for disparate results in similar cases is quite real, and the circumstances of Mr. Mejia's case make the conflict yet more pellucid.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ELLIOT H. SCHERKER
Counsel of Record
OSCAR LEVIN
BRENDA K. SUPPLE
GREENBERG TRAURIG, P.A.
Attorneys for Petitioner
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED, ENTERED AND FILED JUNE 22, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4426

D. C. Docket No. 97-3108-CIV-LENARD

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner-Appellant,

versus

JANET RENO, as Attorney General of the United States, and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

No. 98-5878

INS No. A29-362-615

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner,

versus

Appendix A

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review from the
Board of Immigration Appeals

(June 22, 1999)

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.*

HULL, Circuit Judge:

This consolidated case involves two separate appeals. First, in 1997 Appellant Ernesto Alonso Mejia Rodriguez ("Mejia") filed a motion to reopen his deportation proceedings, which became final in 1994. The BIA denied Mejia's motion to reopen. In appeal No. 98-5878, Mejia has filed a petition for review in this Court appealing the BIA's denial of his motion to reopen.

While his motion to reopen was still pending before the BIA, Mejia filed a § 2241 petition in September 1997 challenging his 1994 deportation order. In appeal No. 98-4426, Mejia appeals the district court's dismissal of his § 2241 petition. After review, we affirm the BIA's denial of Mejia's motion to reopen in appeal No. 98-5878. Because in addressing Mejia's petition for review we reach all of the

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* This decision is rendered by a quorum due to Judge Henderson's death on May 11, 1999. *See* 28 U.S.C. § 46(d).

issues raised in Mejia's § 2241 petition, we affirm the district court's dismissal of Mejia's § 2241 petition but do so because Mejia's § 2241 petition is now moot.

I. Facts and Procedural History

Mejia is a native of Honduras who lawfully entered the United States as a nonimmigrant visitor on November 17, 1980.

A. Mejia's Criminal Offense

On April 14, 1986, Mejia was charged in Florida state court with possession of cocaine, trafficking in cocaine, and conspiracy. On July 24, 1986, Mejia pled no contest to the cocaine-trafficking charge. As part of a plea agreement, the court withheld a final adjudication of guilt and sentenced Mejia to a one-year term of youth-offender incarceration and two years to be served in a "Community Control Program."

Mejia introduced evidence in the district court which established that he entered his no-contest plea in reliance on certain representations.[1] Specifically, both the trial court and Mejia's counsel advised him that his no-contest plea would not yield any adverse immigration consequences. In addition, Mejia was advised that his criminal record would be sealed upon completion of his probationary sentence.

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1. Mejia established the terms of his plea agreement and his plea colloquy through affidavits from his attorney, the prosecutor, and the sentencing judge.

Prior to his first deportation hearing, Mejia filed a petition in Florida state court to seal his criminal record. The Florida court denied Mejia's petition. After his first deportation hearing, Mejia filed a motion for reconsideration of the state court's denial of his petition to seal his criminal record. Mejia's motion contended that he entered his no-contest plea in reliance on the court's representation that his criminal record would be sealed and that his plea would not cause any "immigration problems." On December 4, 1990, the state court granted Mejia's petition to seal his criminal records.

B. Deportation Proceedings Concluded in 1994

On March 8, 1990, the INS commenced deportation proceedings against Mejia. The INS issued an Order to Show Cause which asserted two grounds for deportation. First, the INS charged Mejia with deportability under INA § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1990), as an alien who had entered the United States without inspection by an immigration officer, and under INA § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1990), as an alien convicted of a crime involving controlled substances.

On December 6, 1990, the INS amended its show-cause order withdrawing these two grounds for deportation and charging Mejia with deportability under INA § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1990), for overstaying his nonimmigrant visa. The INS alleged that Mejia originally had entered the United States as a nonimmigrant visitor and later changed his status to nonimmigrant student. According to the INS, Mejia's nonimmigrant-student visa expired in August 1990.

Appendix A

After the state court had sealed Mejia's criminal record, the immigration judge found Mejia deportable. On January 24, 1991, the immigration judge entered a deportation order concluding that Mejia had unlawfully remained in the United States beyond the period allowed by his nonimmigrant visa. However, the immigration judge allowed Mejia leave to file for "suspension of deportation." On February 21, 1991, Mejia filed for suspension of deportation under INA § 244, 8 U.S.C. § 1254(a)(2) (1991).[2]

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2. At the time of Mejia's initial deportation proceedings, the Attorney General could order the "suspension of deportation" if: (1) deportation was based on certain specified grounds, (2) the alien had "been physically present in the United States for a continuous period of not less than seven years immediately preceding" the application for suspension or "physically present in the United States for a continuous period of not less than ten years" after becoming deportable, (3) in that time was a person of "good moral character", and (4) in the opinion of the Attorney General, deporting the alien would cause "exceptional and extremely unusual hardship" to the alien or any of the alien's "spouse, parent, or child" who are United States citizens. INA § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1991). At the time of Mejia's deportation proceedings, INA § 101(f) listed a number of factors that precluded an alien from being considered a "person of good moral character", and this list included aliens who are deportable for a conviction involving controlled substances. INA § 101(f), 8 U.S.C. § 1101(f) (1991).

Even if Mejia had met the first three requirements for suspension of deportation, he has not demonstrated that he would have received suspension of deportation. Mejia does not contend that he has a spouse, parent, or child who are United States citizens. Thus, Mejia would have had to demonstrate that his deportation would cause him to suffer exceptional and unusual hardship. The Attorney

(Cont'd)

The INS immediately moved to pretermit Mejia's motion for suspension of deportation. The INS argued that Mejia's drug conviction precluded a finding that Mejia had been a person of "good moral character," thus rendering him ineligible for a suspension of deportation.

On August 2, 1991, following a hearing, the immigration judge granted the INS' motion to pretermit Mejia's motion for a suspension of deportation and ordered Mejia deported to Honduras. First, the immigration judge admitted into evidence the records of Mejia's cocaine conviction that had been sealed by the Florida state court. The immigration judge specifically noted that he admitted the records only for the purpose of considering Mejia's application for suspension of deportation and not to establish another ground for deportation. The immigration judge found that these records established a conviction as defined under federal immigration law. Based on his conviction for cocaine trafficking, the immigration judge found that Mejia could not be deemed a person of "good moral character" and therefore could not meet the requirements for suspension of deportation under INA §§ 244(a)(2) & 101(f), 8 U.S.C. § 1254(a)(2) & 1101(f) (1991).[3]

(Cont'd)
General possessed the discretion to construe narrowly the "exceptional and extremely unusual hardship" element of the suspension-of-deportation analysis. *Gomez-Gomez v. INS*, 681 F.2d 1347, 1349 (11th Cir. 1982). *See* footnote 8 *infra*.

3. IIRIRA replaced suspension of deportation with a new, and somewhat similar, procedure called "cancellation of removal." INA § 240A, 8 U.S.C. § 1229b (Supp. 1998).

Mejia appealed the immigration judge's August 1991 decision to the BIA, and on January 12, 1994, the BIA affirmed the deportation order entered by the immigration judge. First, the BIA concluded that the immigration judge properly found Mejia deportable for remaining in the United States following the expiration of his student visa. In doing so, the BIA also rejected Mejia's claim that he remained in the United States only to contest his deportation. In addition, the BIA upheld the immigration judge's determination that Mejia had been "convicted" for the purposes of federal immigration law regardless of the fact that the state court had ordered Mejia's records sealed. As a result of this conclusion, the BIA found that Mejia was within a class of aliens who could be deported based on a controlled-substance conviction and therefore concluded that the immigration judge properly found that Mejia was ineligible for a suspension of deportation.

C. Mejia is a Fugitive from May 1995 Until September 1997

In a letter dated April 12, 1995, the INS informed Mejia that he was scheduled to be deported on May 12, 1995, and ordered him to report to the INS on that date for deportation to Honduras. Mejia did not appear for deportation as ordered. Although Mejia could have sought judicial review of the BIA's January 1994 decision, he did not do so and instead absconded.

D. Drug Conviction Vacated in 1997

While he remained a fugitive from deportation, on May 21, 1997, Mejia petitioned in Florida state court for a writ

coram nobis in which he sought to vacate his drug-trafficking conviction. Mejia contended that he did not receive effective assistance of counsel in his state criminal proceedings because he was not informed of the immigration consequences of his no-contest plea.

On August 1, 1997, the state court vacated Mejia's plea and sentence. Subsequently, the Florida State's Attorney announced a *nolle prosequi* of the cocaine-trafficking charges against Mejia.

E. BIA Denies Mejia's Motion to Reopen Deportation Proceedings

On September 23, 1997, the INS took Mejia into custody to execute the final deportation order entered in January 1994. On September 26, 1997, Mejia filed two motions to reopen his deportation proceedings — one with the immigration judge and one with the BIA. According to Mejia, the immigration judge refused to accept this motion. Before the BIA, Mejia argued that his application for suspension of deportation had been pretermitted based on a criminal conviction and that this conviction was vacated after his suspension application had been pretermitted. Thus, Mejia contended that the BIA should reopen his deportation proceeding to allow him to file another application for suspension of deportation.

In an order dated November 27, 1998, the BIA denied Mejia's motion to reopen his deportation proceedings. The BIA noted that under 8 C.F.R.§ 3.2(c)(2) a motion to reopen deportation proceedings must be filed within 90 days of the

BIA's decision or before September 30, 1996, whichever is later. As Mejia did not file his motion to reopen until September 1997, the BIA concluded that his motion was not timely filed. On December 14, 1998, Mejia filed, in this Court, a petition for review of the BIA's November 1998 order. *Mejia-Rodriguez v. INS*, No. 98-5878.

F. Mejia's Petition for a Writ of Habeas Corpus

On September 26, 1997, while his motion to reopen his deportation proceedings was still pending before the BIA, Mejia filed a § 2241 petition for habeas corpus in United States District Court for the Southern District of Florida. 28 U.S.C. § 2241. In this petition, Mejia alleged that the immigration judge's order pretermitting Mejia's application for suspension of deportation was based upon an unconstitutional conviction subsequently vacated by the Florida state courts. Mejia's petition further alleged that this ineffective assistance of counsel in state court unconstitutionally tainted Mejia's federal immigration proceedings because it had the collateral effect of precluding Mejia's application for suspension of deportation, which was provided for under federal law. Finally, Mejia alleged that denying him the right to seek a suspension of deportation based on his unconstitutionally obtained state drug conviction constituted a deprivation of due process.

On September 26, 1997, the district court dismissed Mejia's *habeas* petition and denied his request for a stay of deportation. The district court found that Mejia's petition was not timely filed under INA § 106(a)(1), 8 U.S.C. § 1105a(a)(1) (1996).

Mejia filed a motion for reconsideration of the court's order and for a stay of his deportation. In his motion, Mejia argued that the district court had erroneously relied on INA § 106(a)(1), a statute that had been repealed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and that his petition was based on 28 U.S.C. § 2241 — not INA § 106(a)(1). On October 7, 1997, the district court granted Mejia's motion to the extent it sought a stay of his deportation. The court denied Mejia's motion for reconsideration in an order dated November 14, 1997.

G. Mejia's Renewed Habeas Petition

On November 21, 1997, Mejia filed a renewed petition for habeas corpus under the same civil action number in the district court. In his new petition, Mejia reiterated the claims that he asserted in his initial petition and again asserted § 2241 as the sole basis for the court's jurisdiction.

On March 12, 1998, the district court dismissed Mejia's renewed petition and denied his request for a stay of deportation. The district court found that under 8 C.F.R. § 3.23, a motion for reconsideration of an "administrative order of removal, deportation, or exclusion" must be filed within thirty days of the order or before July 31, 1996, whichever is later, and a motion to reopen deportation proceedings must be filed within ninety days of the final order or before July 31, 1996, whichever is later. The district court further noted that Mejia did not file his motion to reopen until September 26, 1997, and that because the motion was not timely filed, the immigration judge refused to consider his motion.

The district court reasoned that essentially Mejia's habeas corpus petition "invited the court" to force the immigration judge to consider an untimely motion to reopen that the judge had refused to consider. The district court concluded that it "must decline that invitation."

On March 12, 1998, Mejia filed a Notice of Appeal of the district court's decision and, on March 13, 1998, this Court temporarily stayed Mejia's deportation pending appeal.

III. Discussion

A. Mejia's Two Appeals

Two appeals are involved in this case. First, Mejia appeals the district court's dismissal of his § 2241 petition. Second, Mejia petitions for review of the BIA's order denying his motion to reopen. Mejia raises similar arguments in both of these appeals. Indeed, in his brief, Mejia argues that if he is afforded a full review on his petition for review, this Court need not address his appeal of the district court's dismissal of Mejia's § 2241 petition. Because we have considered all of Mejia's claims through his petition for review, particularly his ineffective-assistance claim, we do not decide whether the district court properly exercised jurisdiction over Mejia's § 2241 petition. Instead, we reach the merits of Mejia's petition for review and dismiss the § 2241 petition as moot.[4]

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4. Mejia did not raise his ineffective-assistance of counsel argument before the BIA. Arguably, Mejia's failure to present his ineffective-assistance claim to the BIA precludes the assertion of (Cont'd)

Likewise, we do not reach the issue of whether Mejia's petition for review is governed by the INA prior to the amendments by IIRIRA or by the INA as amended by IIRIRA. Mejia's 1994 deportation order became final prior to IIRIRA's enactment, but Mejia's motion to reopen was filed after IIRIRA's general effective date. A split in the circuits exists over whether a motion to reopen is a new proceeding or a continuation of the deportation proceedings. *Lerma de Garcia v. INS*, 141 F.3d 215 (5th Cir. 1998); *Sarmandi v. INS*, 121 F.3d 1319, 1321 (9th Cir. 1997); *Chow v. INS*, 113 F.3d 659, 665 (7th Cir. 1997) *with Wright v. Ouellette*, 171 F.3d 8, 12 (1st Cir. 1999). If a motion to reopen constitutes a new proceeding, judicial review of the BIA's denial of Mejia's motion to reopen would be governed by the INA as amended by IIRIRA. However, former INA § 106(a)(2) provided for jurisdiction in this Court over petitions for review challenging final deportation orders, and under INA §§ 242(b)(2) & (9), enacted by IIRIRA, this Court has jurisdiction over petitions for review "arising from any action taken or proceeding brought to remove an alien from the United States." 8 U.S.C. § 1105a(a) (1995); 8 U.S.C. §§ 1252(b)(2) & (9) (Supp. 1998). Thus, this Court would have jurisdiction over Mejia's petition for review under either the pre-IIRIRA or post-IIRIRA INA and we do not resolve

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(Cont'd)
the ineffective-assistance claim in Mejia's petition for review. *Mojsilovic v. INS*, 156 F.3d 743, 748 (7th Cir. 1998). Other courts have found that an alien can raise an ineffective-assistance claim for the first time in a petition for review. *See, e.g. Szilagyi v. INS*, 131 F.3d 148 (9th Cir. 1997). We do not reach this issue because we find that, in any event, Mejia has not established an ineffective-assistance claim.

the issue of whether the INA prior to the IIRIRA amendments, or the post-IIRIRA INA, applies to the judicial review of Mejia's deportation.

B. Standard of Review

This Court reviews the BIA's denial of a motion to reopen for an abuse of discretion. *Gomez-Gomez v. INS*, 681 F.2d 1347, 1348 (11th Cir. 1982).

C. Mejia's Untimely Motions to Reopen

Mejia has not established that the BIA abused its discretion in denying his motion to reopen and has not established that he has suffered any constitutional injury in his deportation proceedings. Mejia argues that he continues to suffer the consequences of the ineffective assistance of counsel that he received in his state criminal proceeding because his unconstitutional conviction has rendered him ineligible for suspension of deportation. According to Mejia, his ineligibility for suspension represents a continuing violation of his Sixth Amendment right to the effective assistance of counsel. Importantly, however, the BIA did not address Mejia's ineffective-assistance argument. Instead, the BIA simply rejected Mejia's attempts to reopen his deportation proceedings because Mejia's motions to reopen were filed long after the expiration of the time period for filing motions to reopen under the BIA's regulations.

The BIA correctly concluded that Mejia's motions were untimely. Pursuant to 8 C.F.R. § 3.2(c)(2), a motion to reopen deportation proceedings must be filed within 90 days of the

"final administrative decision" by the BIA or before September 30, 1996, whichever is later. Mejia did not file his motion to reopen until September 26, 1997 — many more than 90 days after his final deportation order, which was entered in 1994, and almost a year after the September 30, 1996 deadline.[5]

Limitations periods are not inherently suspect. The Supreme Court noted in *Calderon v. Thompson*, 523 U.S. 538 (1998), that "[f]inality . . . enhances the quality of judging." Similarly, the Supreme Court has recognized the obvious fact that limitations periods will necessarily preclude the litigation of certain meritorious claims. *Board of Regents v. Tomanio*, 446 U.S. 478, 485 (1980). Nevertheless, the Court has found that "[s]tatutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Id.* at 488. Thus, even assuming that Mejia suffered a constitutional violation in his deportation proceedings, the application of the limitations period from 8 C.F.R. § 3.2(c)(2) does not raise constitutional concerns merely because it leaves Mejia without a remedy for vindicating his assumed constitutional injury.

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5. We note that the BIA could have reopened Mejia's deportation proceeding pursuant to 8 C.F.R § 3.2(a). This provision allows the BIA to reopen proceedings *sua sponte* and "at any time." 8 C.F.R. § 3.2(a). However, the BIA did not abuse its discretion in concluding that Mejia's arguments did not justify the reopening of his deportation proceedings, especially in light of the fact that Mejia did not challenge his final deportation order when it was originally entered but instead absconded from 1994 until 1997.

C. Mejia's Fifth Amendment Ineffective-Assistance Claim

Since Mejia's motion to reopen is clearly time barred, Mejia alternatively contends that his motion to reopen was untimely as a result of ineffective assistance of counsel in his deportation proceedings. Mejia contends that the same attorneys who advised him that his no-contest plea would not affect his immigration status also pursued a "frivolous legal position" in attempting to argue that Mejia's conviction could not be used as grounds for deportation. Thus, according to Mejia, if not for his counsels' deficient performance in his deportation proceedings, he would have sought to vacate his sentence in state court earlier and then promptly moved to reopen his deportation before the expiration of the limitations period. According to Mejia, his counsels' deficient performance in his deportation proceedings amounts to a violation of Mejia's Fifth Amendment right to due process.[6]

In order to evaluate Mejia's ineffective-assistance argument, it is important to reemphasize that Mejia is currently facing deportation for overstaying his student visa — not for his drug conviction. Mejia does not contest the validity of the basis for his deportation order. Therefore, Mejia's ineffective-assistance contentions necessarily focus on only his argument that, except for the cocaine conviction, he would have been eligible for suspension of deportation. As suspension of deportation is an extraordinary remedy over

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6. We note that, in addition to counsel who represented Mejia in his criminal proceedings, another attorney jointly appeared on Mejia's behalf in his deportation proceedings.

which the Attorney General possesses broad discretion, Mejia does not, and cannot, argue that he would have received suspension, and thus would not be facing deportation, if he had received effective assistance from his counsel during his initial deportation proceedings. Thus, the issue becomes whether deficient representation by counsel in deportation proceedings that renders an alien ineligible for suspension of deportation inflicts a constitutional injury.

D. Ineffective Assistance in the Context of Eligibility for Suspension of Deportation

Despite Mejia's arguments, the application of the limitations periods from 8 C.F.R. § 3.2(c)(2) to his motion to reopen did not result in a violation of Mejia's right to the effective assistance of counsel in his deportation proceedings.

Aliens enjoy the right to the effective assistance of counsel in deportation proceedings. *Barthold v. INS*, 517 F.2d 689, 690 (5th Cir. 1975). Numerous courts have recognized that a deportation proceeding implicates an alien's liberty interest, which is protected by the Due Process Clause. *See, e.g., Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *Kaoru Yamataya v. Fisher*, 189 U.S. 86 (1903); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1037 n.30 (5th Cir. 1982). Therefore, the Due Process Clause — not the Sixth Amendment — gives rise to the right to effective assistance of counsel in deportation proceedings. *Id.* Thus, to establish the ineffective assistance of counsel in the context of a deportation hearing, an alien must establish that his or her counsel's performance was deficient to the point that it impinged the "fundamental fairness" of the hearing. *Id.* at 691. Other circuits have

concluded that to establish the lack of fundamental fairness in a deportation proceeding, the alien must establish deficient representation and "prejudice" or "substantial prejudice" arising from this deficient representation. *See, e.g., Esposito v. INS*, 987 F.2d 108, 110 (2d Cir. 1993); *Mohsseni Behbahani v. INS*, 796 F.2d 249, 251 (9th Cir. 1986); *Ogbemudia v. INS*, 988 F.2d 595, 598 (5th Cir. 1993) (requiring a showing of "substantial prejudice").

However, the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981). In *Dumschat*, the Supreme Court held that a state inmate does not enjoy a constitutionally protected liberty interest in having his or her sentence commuted, even where the state "consistently" commuted the sentences of inmates in "most" cases. *Dumschat*, 452 U.S. at 464-65. The Court reasoned that "a constitutional entitlement cannot 'be created — as if by estoppel — merely because a wholly and expressly discretionary state privilege has been granted generously in the past.' " *Id.* (quoting *Leis v. Flynt*, 439 U.S. 438, 444 n.5 (1979)). Instead, according to the Court, "[i]n terms of the Due Process Clause, a . . . felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope." *Dumschat*, 452 U.S. at 465.

This Court has applied *Dumschat* in the immigration context. *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986). In *Garcia-Mir*, a group of Cuban aliens claimed a

liberty interest in remaining "paroled"[7] into the United States while their immigration proceedings were pending. *Id.* at 1450-51. This Court acknowledged that actions by both Congress and the President had created a substantial expectation that the Cuban aliens would be allowed to remain on parole. *Id.* Nevertheless, as was the case in *Dumschat*, this Court in *Garcia-Mir* reasoned that, where a statute or regulation does not limit the executive's discretion to award relief, an expectancy of such relief does not give rise to a liberty interest protected by the Due Process Clause. *Id.* at 1452. Thus, relying on *Dumschat*, this Court concluded that the aliens did not enjoy a constitutionally protected liberty interest in "parole", which remained a purely discretionary form of relief. *Id.*

Likewise, the Seventh and Tenth Circuits have applied *Dumschat* to conclude that aliens do not enjoy constitutionally protected interests in either the adjustment of immigration status or "deferred action" by the INS. In *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1265 (7th Cir. 1985), the Seventh Circuit held that aliens did not enjoy a protectable liberty interest in the reopening of deportation proceedings or the adjustment of immigration status. The Seventh Circuit specifically noted that an adjustment of status constituted "mercy" and that "[n]o one is entitled to mercy, and there are no standards by which judges may patrol its exercise." *Id.* Likewise, the Tenth Circuit has concluded that "deferred action" by the INS does not give rise to a

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7. In the immigration context, "parole" refers to the practice of allowing aliens to enter the United States while their immigration proceedings are completed. *See, e.g., Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984).

constitutionally protected liberty interest because the INS has "unfettered" discretion to determine who is entitled to deferred action. *Velasco-Gutierrez v. Crossland*, 732 F.2d 792, 797 (10th Cir. 1984).

Very similar to the type of relief at issue in *Dumschat* and *Garcia-Mir*, "suspension of deportation" is an "act of grace" committed to the "unfettered discretion" of the Attorney General. *Jay v. Boyd*, 351 U.S. 345, 354 (1956) (quoting *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935)). As such, even if an alien meets the statutory requirements for eligibility for suspension of deportation, the alien is not in any way entitled to this "exceptional remedy." *Id.*; *INS v. Jong Ha Wang*, 450 U.S. 139, 145 (1981); *Saiyid v. INS*, 132 F.3d 1380, 1384 (11th Cir. 1998); *see also Gomez-Gomez v. INS*, 861 F.2d 1347 (11th Cir. 1982) (reasoning that the Attorney General has the discretion to interpret narrowly the requirement of "extreme hardship"). In this sense, suspension of deportation is similar to an executive pardon. *Jay*, 351 U.S. at 355 n.16. Indeed, the Supreme Court recently reaffirmed the analogy between suspension of deportation and an executive pardon by stating:

> We have described the Attorney General's suspension of deportation under a related and similarly phrased provision of the INA as " 'an act of grace' " which is accorded pursuant to her "unfettered discretion" and have quoted approvingly Judge Learned Hand's likening of that provision to " 'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.' "

Appendix A

INS v. Yueh-Shaio Yang, 519 U.S. 26, 29 (1996) (citations omitted).

Accordingly, an attorney's deficient representation does not deprive an alien of due process if the deficient representation merely prevents the alien from being eligible for suspension of deportation. An alien's actual chances of receiving such discretionary relief are too speculative, and too far beyond the capability of judicial review, to conclude that the alien has actually suffered prejudice from being ineligible for suspension of deportation. Just as a convicted felon enjoys no constitutional right to a pardon and aliens have no due process rights to being "paroled", an alien has no constitutional right to suspension of deportation. Just as a court cannot review the inherently "subjective" judgments made by the executive in deciding whether to commute a life sentence, this Court cannot predict the subjective and fact-intensive judgments that the Attorney General would make in deciding whether to grant extraordinary relief, such as the suspension of deportation. *Dumschat*, 452 U.S. at 464. Accordingly, we cannot hold that being ineligible for suspension of deportation as a consequence of deficient representation constitutes a violation of due process. In other words, an alien has not been deprived of "fundamental fairness" simply by being ineligible for a purely discretionary "act of grace" like suspension of deportation. The alien cannot demonstrate prejudice, much less substantial prejudice, arising from the ineligibility for such an "act of grace" because no standards exist for a court to determine whether the executive would have granted the extraordinary relief anyway.[8]

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8. We note that the Second and Fifth Circuits have recognized potential ineffective-assistance-of-counsel claims based on an (Cont'd)

In this case, assuming Mejia's representation during his initial deportation proceedings was deficient, this deficient

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(Cont'd)
attorney's failure to apply for a waiver of deportation under INA § 212(c), 8 U.S.C. § 1182(c) (1993). *Rabiu v. INS*, 41 F.3d 879 (2d Cir. 1994); *Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994). For a number of reasons, *Rabiu* and *Miranda-Lores* do not aid Mejia. First, neither case discusses *Dumschat* or explains how the possibility of receiving such discretionary relief can implicate a constitutionally protected liberty interest entitled to due process protection. Second, both *Rabiu* and *Miranda-Lores* involved waiver of deportation which, unlike suspension of deportation, is available to only lawful permanent residents of the United States who have a greater expectancy of remaining in the United States than aliens, like Mejia, who are not lawful permanent residents. *Rabiu*, 41 F.3d at 881; *Miranda-Lores*, 17 F.3d at 85.

Third, even under *Rabiu* and *Miranda-Lores*, it does not appear that Mejia would be able to establish an ineffective-assistance claim. Under *Rabiu*, an alien must make a prima facie showing of eligibility for waiver of deportation and demonstrate a "strong showing" in support of the application for discretionary relief. *Rabiu*, 41 F.3d at 882. Similarly, under *Miranda-Lores*, the alien must establish "substantial prejudice" arising from the deficient performance, which requires that the alien make a prima facie showing of eligibility and demonstrate that he or she would receive the relief sought. *Miranda-Lores*, 17 F.3d at 85 (rejecting the ineffective assistance-claim because the alien failed to establish prejudice).

In this case, to be eligible for suspension, Mejia would have had to demonstrate "exceptional and extremely unusual hardship" if he is returned to Honduras. Mejia has not made a "strong showing" of an "exceptional . . . hardship" and thus has not shown "prejudice" — let alone "substantial prejudice" — arising from his attorneys' deficient performance.

representation did not deprive Mejia of due process. The only consequence of his counsel's deficient representation that Mejia alleges is that he is ineligible for suspension. As mentioned above, Mejia does not, and cannot, establish that, but for his counsel's deficient representation, he would not have been ordered deported. Moreover, Mejia has not even made a strong showing that he would have been able to demonstrate an extreme hardship arising from his return to Honduras. Therefore, Mejia has not demonstrated that the alleged ineffectiveness of his counsel caused any actual "prejudice" or "substantial prejudice", because Mejia has not, and could not, argue that he would have received the extraordinary relief of suspension were it not for his counsel's deficient performance.[9]

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9. We note that in the context of determining whether AEDPA § 440(d) applied retroactively, this Court observed that restrictions on eligibility for waiver of deportability "arguably attaches a new disability", which counseled against the retroactive application of AEDPA § 440(d). *Mayers v. INS*, Nos. 97-5537 & 98-8185 (11th Cir. May 20, 1999). For three reasons, our statement in *Mayers* does not alter our conclusion that a due-process ineffective-assistance-of-counsel claim cannot be premised on being ineligible for suspension of deportation. First, in *Mayers* we specifically noted that because Congress did not intend a retroactive application of AEDPA § 440(d), we did not need to reach the issue of whether § 440(d) would have a retroactive effect. Thus, the statement in *Mayers* is dicta. Second, the argument, recognized in *Mayers*, that a statute has a retroactive effect by attaching a new disability is quite different from our holding in this case that such a disability, if it is even a disability, does not implicate a constitutionally protected liberty interest. Third, *Mayers* involved applications for waiver of deportation by permanent residents of the United States, who enjoy a heightened expectancy of remaining in the United States.

Because Mejia's petition for review does not allege any constitutional infirmity arising from the BIA's denial of his motion to reopen, the BIA did not err in denying Mejia's motion as untimely.

IV. Conclusion

For the foregoing reasons, the Board of Immigration Appeals' final order of deportation is **AFFIRMED**. The appeal from the district court's judgment dismissing the § 2241 petition is **DISMISSED AS MOOT**.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4426

District Court No. 97-3108-CIV

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner-Appellant,

versus

JANET RENO, as Attorney General of the United States, and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

No. 98-5878

Immigration and Naturalization Service No. A29-362-615

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Appendix A

Petition for Review from the
Board of Immigration Appeals

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.*

JUDGMENT

These causes came to be heard on Ernesto Alonso Mejia Rodriguez's petition for review of an order of the Board of Immigration Appeals and from the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the Board of Immigrations Appeals' final order of deportation is hereby AFFIRMED; the judgment of the said District Court dismissing the § 2241 petition in this cause be and the same is hereby DISMISSED as moot in accordance with the opinion of this Court.

Entered: June 22, 1999
For the Court: Thomas K. Kahn,
Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: APR 10 2000

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* This decision is rendered by a quorum due to Judge Henderson's death on May 11, 1999. 28 U.S.C. § 46(d).

APPENDIX B — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, *SUA SPONTE*, VACATING JANUARY 4, 1999 ORDER DATED AND FILED MARCH 5, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4426

D. C. Docket No. 97-3108-CIV-LENARD

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner-Appellant,

versus

JANET RENO, as Attorney General of the United States, and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(March 5, 1999)

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

Appendix B

PER CURIAM:

The Court *sua sponte* **VACATES** its opinion in the above-styled case, which is currently published at 164 F.3d 575 (11th Cir. 1999). The case is resubmitted to the Court for decision. Petitioner/Appellant's Motion for Rehearing is **DENIED** as **MOOT**.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JANUARY 4, 1999

Ernesto Alonso Mejia RODRIGUEZ,

Petitioner-Appellant,

v.

Janet RENO, as Attorney General of the United States, and the Immigration and Naturalization Service,

Respondents-Appellees.

No. 98-4426.

United States Court of Appeals,
Eleventh Circuit.

Jan. 4, 1999.

* * *

Appeal from the United States District Court for the Southern District of Florida.

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

HULL, Circuit Judge:

Appellant Ernesto Alonso Mejia Rodriguez ("Mejia") appeals the district court's dismissal of his § 2241 petition

for a writ of habeas corpus, filed in 1998, challenging his final deportation order entered in 1994. After review, we affirm.

I. Facts and Procedural History

Mejia is a native of Honduras who lawfully entered the United States as a nonimmigrant visitor on November 17, 1980.

A. Mejia's Criminal Offense

On April 14, 1986, Mejia was charged in Florida state court with possession of cocaine, trafficking in cocaine, and conspiracy. On July 24, 1986, Mejia pled no contest to the cocaine-trafficking charge. As part of a plea agreement, the court withheld a final adjudication of guilt and sentenced Mejia to a one-year term of youth-offender incarceration and two years to be served in a "Community Control Program."

Mejia introduced evidence in the district court which established that he entered his no-contest plea in reliance on certain representations.[1] Specifically, both the trial court and Mejia's counsel advised him that his no-contest plea would not yield any adverse immigration consequences. In addition, Mejia was advised that his criminal record would be sealed upon completion of his probationary sentence.

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1. Mejia established the terms of his plea agreement and his plea colloquy through affidavits from his attorney, the prosecutor, and the sentencing judge.

Appendix C

Prior to his first deportation hearing, Mejia filed a petition in Florida state court to seal his criminal record. The Florida court denied Mejia's petition. After his first deportation hearing, Mejia filed a motion for reconsideration of the state court's denial of his petition to seal his criminal record. Mejia's motion contended that he entered his no-contest plea in reliance on the court's representation that his criminal record would be sealed and that his plea would not cause any "immigration problems." On December 4, 1990, the state court granted Mejia's petition to seal his criminal records.

B. Deportation Proceedings

On March 8, 1990, the INS commenced deportation proceedings against Mejia. The INS issued an Order to Show Cause which asserted two grounds for deportation. First, the INS charged Mejia with deportability under INA § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1990), as an alien who had entered the United States without inspection by an immigration officer, and under INA § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1990), as an alien convicted of a crime involving controlled substances.

On December 6, 1990, the INS amended its show-cause order withdrawing these two grounds for deportation and charging Mejia with deportability under INA § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1990), for overstaying his nonimmigrant visa. The INS alleged that Mejia originally had entered the United States as a nonimmigrant visitor and later changed his status to nonimmigrant student. According to the INS, Mejia's nonimmigrant-student visa expired in August 1990.

Appendix C

After the state court had sealed Mejia's criminal record, the immigration judge found Mejia deportable. On January 24, 1991, the immigration judge entered a deportation order concluding that Mejia had unlawfully remained in the United States beyond the period allowed by his nonimmigrant visa. However, the immigration judge allowed Mejia leave to file for a suspension of deportation. On February 21, 1991, Mejia filed for suspension of deportation under INA § 244, 8 U.S.C. § 1254(a)(2) (1991).[2]

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2. At the time of Mejia's initial deportation proceedings, the Attorney General could order the "suspension of deportation" if: (1) deportation was based on certain specified grounds, (2) the alien had been "physically present in the United States for a continuous period of not less than ten years" after becoming deportable, (3) in that time was a person of "good moral character," and (4) in the opinion of the Attorney General, deporting the alien would cause "exceptional and extremely unusual hardship" to the alien or any of the alien's "spouse, parent, or child" who are United States citizens. INA § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1991). At the time of Mejia's deportation proceedings, INA § 101(f) listed a number of factors that precluded an alien from being considered a "person of good moral character," and this list included aliens who are deportable for a conviction involving controlled substances. INA § 101(f), 8 U.S.C. § 1101(f) (1991). The Attorney General possessed the discretion to interpret narrowly the "exceptional and extremely unusual hardship" element of the suspension-of-deportation analysis. *Gomez-Gomez v. INS,* 681 F.2d 1347, 1349 (11th Cir.1982). Accordingly, Mejia has not demonstrated that even without his drug conviction, he would have been found eligible for this extraordinary relief.

IIRIRA replaced suspension of deportation with a new, but similar, procedure called "cancellation of removal." INA § 240A, 8 U.S.C. § 1229b (Supp.1998). A non-permanent resident alien is

(Cont'd)

Appendix C

(Cont'd)
eligible for a cancellation of removal and the adjustment of status "to an alien lawfully admitted for permanent residence" if the alien:

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application [for cancellation of removal];
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title; and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

INA § 240A, 8 U.S.C. § 1229b (Supp.1998). Unlike the old suspension-of-deportation statute, INA § 244, the cancellation-of-removal statute specifically refers to 8 U.S.C. § 1182(a)(2) (Supp.1998) and thereby precludes by its own terms cancellation of removal for anyone convicted of, among other ...ted offenses, an offense involving controlled substances. INA § 240A, 8 U.S.C. § 1229b(C) (Supp.1998). Nevertheless, as was the case prior to IIRIRA, INA § 101(f), 8 U.S.C. § 1101(f) (Supp.1998), continues to exclude anyone convicted of a crime involving controlled substances from the definition of a "person of good moral character." Therefore, under the INA as amended by IIRIRA, an alien convicted of a controlled-substance offense is ineligible for cancellation of removal by the terms of INA § 240A, 8 U.S.C. § 1229b (Supp.1998), and because such an alien still can not meet the definition of "a person of good moral character." Moreover, as was the case with suspension of deportation, as to those statutorily eligible, cancellation of removal remains a discretionary act.

Appendix C

The INS immediately moved to pretermit Mejia's motion for suspension of deportation. The INS argued that Mejia's drug conviction precluded a finding that Mejia had been a person of "good moral character," thus rendering him ineligible for a suspension of deportation.

On August 2, 1991, following a hearing, the immigration judge granted the INS' motion to pretermit Mejia's motion for a suspension of deportation and ordered Mejia deported to Honduras. First, the immigration judge admitted into evidence the records of Mejia's cocaine conviction that had been sealed by the Florida state court. The immigration judge specifically noted that he admitted the records only for the purpose of considering Mejia's application for suspension of deportation and not to establish another ground for deportation. The immigration judge found that these records established a conviction as defined under federal immigration law. Based on his conviction for cocaine trafficking, the immigration judge found that Mejia could not be deemed a person of "good moral character" and therefore could not meet the requirements for suspension of deportation under INA §§ 244(a)(2) & 101(f), 8 U.S.C. §§ 1254(a)(2) & 1101(f) (1991).

Mejia appealed the immigration judge's August 1991 decision to the BIA, and on January 12, 1994, the BIA affirmed the deportation order entered by the immigration judge. First, the BIA concluded that the immigration judge properly found Mejia deportable for remaining in the United States following the expiration of his student visa. In doing so, the BIA also rejected Mejia's claim that he remained in the United States only to contest his deportation. In addition,

the BIA upheld the immigration judge's determination that Mejia had been "convicted" for the purposes of federal immigration law regardless of the fact that the state court had ordered Mejia's records sealed. As a result of this conclusion, the BIA found that Mejia was within a class of aliens who could be deported based on a controlled-substance conviction and therefore concluded that the immigration judge properly found that Mejia was ineligible for a suspension of deportation.

In a letter dated April 12, 1995, the INS informed Mejia that he was scheduled to be deported on May 12, 1995, and ordered him to report to the INS on that date for deportation to Honduras. Mejia did not appear for deportation as ordered. Although Mejia could have sought judicial review of the BIA's January 1994 decision, he did not do so and instead absconded.

C. Drug Conviction Vacated

While he remained a fugitive from deportation, on May 21, 1997, Mejia petitioned in Florida state court for a writ *coram nobis* in which he sought to vacate his drug-trafficking conviction. Mejia contended that he did not receive effective assistance of counsel in his state criminal proceedings because he was not informed of the immigration consequences of his no-contest plea.

On August 1, 1997, the state court vacated Mejia's plea and sentence. Subsequently, the Florida State's Attorney announced a *nolle prosequi* of the cocaine-trafficking charges against Mejia.

Appendix C

D. Mejia's Motion to Reopen his Deportation Proceedings

On September 23, 1997, the INS took Mejia into custody to execute the final deportation order entered in January 1994. On September 26, 1997, Mejia filed two motions to reopen his deportation proceedings — one to the immigration judge and one to the BIA. According to Mejia, the immigration judge refused to accept this motion.

In an order dated November 27, 1998, the BIA denied Mejia's motion to reopen his deportation proceedings. The BIA noted that under 8 C.F.R. § 3.2(c)(2) a motion to reopen deportation proceedings must be filed within 90 days of the BIA's decision or before September 30, 1996, whichever is later. As Mejia did not file his motion to reopen until 1997, the BIA concluded that his motion was not timely filed. On December 14, 1998, Mejia filed, in this Court, a petition for review of the BIA's November 1998 order. *Mejia-Rodriguez v. INS,* No. 98-5878.

E. Mejia's Petition for a Writ of Habeas Corpus

On September 26, 1997, while his motion to reopen his deportation proceedings was still pending before the BIA, Mejia filed a § 2241 petition for habeas corpus in United States District Court for the Southern District of Florida. 28 U.S.C. § 2241. In this petition, Mejia alleged that the immigration judge's order pretermitting Mejia's application for suspension of deportation was based upon an unconstitutional conviction subsequently vacated by the Florida state courts. Mejia's petition further alleged that this

ineffective assistance of counsel in state court unconstitutionally tainted Mejia's federal immigration proceedings because it had the collateral effect of precluding Mejia's application for suspension of deportation, which was provided for under federal law. Finally, Mejia alleged that denying him the right to seek a suspension of deportation based on his unconstitutionally obtained state drug conviction constituted a deprivation of due process. With his petition, Mejia also filed an emergency motion for a stay of deportation.

On September 26, 1997, the district court dismissed Mejia's petition and denied his request for a stay of deportation. The district court found that Mejia's petition was not timely filed under INA § 106(a)(1), 8 U.S.C. § 1105a(a)(1) (1996).

Mejia filed a motion for reconsideration of the court's order and for a stay of his deportation. In his motion, Mejia argued that the district court had erroneously relied on INA § 106(a)(1), a statute that had been repealed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and that his petition was based on 28 U.S.C. § 2241 — not INA § 106(a)(1). On October 7, 1997, the district court granted Mejia's motion to the extent it sought a stay of his deportation. The court denied Mejia's motion for reconsideration in an order dated November 14, 1997.

F. Mejia's Renewed Habeas Petition

On November 21, 1997, Mejia filed a renewed petition for habeas corpus under the same civil action number in the

district court. In his new petition, Mejia reiterated the claims that he asserted in his initial petition and again asserted § 2241 as the sole basis for the court's jurisdiction.

On March 12, 1998, the district court dismissed Mejia's renewed petition and denied his request for a stay of deportation. The district court found that under 8 C.F.R. § 3.23, a motion for reconsideration of an "administrative order of removal, deportation, or exclusion" must be filed within thirty days of the order or before July 31, 1996, whichever is later, and a motion to reopen deportation proceedings must be filed within ninety days of the final order or before July 31, 1996, whichever is later. The district court further noted that Mejia did not file his motion to reopen until September 26, 1997, and that because the motion was not timely filed, the immigration judge refused to consider his motion. The district court reasoned that essentially Mejia's habeas corpus petition "invited the court" to force the immigration judge to consider an untimely motion to reopen that the judge had refused to consider. The district court concluded that it "must decline that invitation."

On March 12, 1998, Mejia filed a Notice of Appeal of the district court's decision and, on March 13, 1998, moved for an emergency stay of his deportation. On the same day, Judge Tjoflat temporarily stayed Mejia's deportation, and on March 26, 1998, Judge Tjoflat ordered that "[t]he stay of [Mejia's] deportation shall continue pending resolution of *Richardson v. Reno,* No. 98-04230, __ F.3d __."

Appendix C

II. Standard of Review

The availability of habeas relief under § 2241 presents questions of law which we review de novo. *Nolen v. Jackson,* 102 F.3d 1187, 1190 (11th Cir.1997).

III. Discussion

A. Mejia's Contentions

Mejia's petitions for habeas relief focus on the collateral effect of his unconstitutional drug conviction on his immigration status. According to Mejia, the Florida courts have deemed his conviction "unconstitutional" because it was obtained in violation of his Sixth Amendment right to the effective assistance of counsel. Mejia contends that, although the conviction has been vacated, the conviction continues to cause adverse consequences to his immigration status. It is important to note, however, that Mejia is currently facing deportation for overstaying his student visa — not for his drug conviction. Therefore, Mejia's contentions necessarily focus on only his argument that, except for the cocaine conviction, he would have been eligible for a suspension of deportation. According to Mejia, his unconstitutional conviction continues to prevent him from being considered for a suspension of deportation. Through his petition for habeas relief, Mejia seeks judicial review to remedy this alleged collateral effect of a constitutional violation, which he contends constitutes a deprivation of due process.[3]

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3. Mejia's claims exclusively focus on his application for suspension of deportation, and he does not challenge the validity of the grounds for deportation that the BIA affirmed in its 1994 order.

Appendix C

As noted above, the district court dismissed Mejia's petition noting that Mejia was attempting to reopen his final 1994 deportation order through habeas. The district court observed that a motion to reopen deportation proceedings must be filed within certain time periods and that the immigration judge had refused to consider Mejia's motion to reopen because it was not timely filed. Accordingly, the district court refused to order the immigration judge to consider an untimely motion.

Similarly, on November 27, 1998, the BIA also denied Mejia's motion to reopen concluding that Mejia had not sought to reopen, in a timely fashion, his deportation proceedings, which became final in 1994. The common theme of these decisions is, in effect, that immigration proceedings, like judicial proceedings, must be timely in order to ensure some degree of finality to the process. Nevertheless, we do not address the merits of the district court's decision because we find that the district court lacked jurisdiction over Mejia's § 2241 petition.

B. Section 2241 Jurisdiction

Mejia filed his first habeas petition in September 1997, well after the April 1, 1997, effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Thus, IIRIRA controls this case. This Court recently concluded that Section 242(g) of the Immigration and Nationality Act ("INA"), as amended by the AEDPA and IIRIRA, repeals district court jurisdiction to issue writs of habeas corpus under § 2241 to aliens challenging their removal from the United States or their

detention while awaiting removal. *Richardson v. Reno*, __ F.3d __, No. 98-4230 (11th Cir. December 22, 1998). Mejia relied on § 2241 as the sole jurisdictional basis for both of his petitions for habeas relief. As the AEDPA and IIRIRA repealed such jurisdiction, the district court lacked jurisdiction over Mejia's petition.

In *Richardson*, this Court also determined that IIRIRA's repeal of § 2241 is not unconstitutional because IIRIRA does not eliminate all judicial review of immigration matters. Instead, this Court in *Richardson* recognized that, under the INA as amended by IIRIRA, Congress has mandated a consolidated form of judicial review of proceedings to remove aliens from the United States — a petition for review in the court of appeals, after a final removal order has been issued.[4]

For reasons similar to those articulated in *Richardson*, the repeal of § 2241 jurisdiction over Mejia's petition is not unconstitutional. Specifically, Mejia has not demonstrated that he has been denied access to judicial review of his 1994 deportation order. The hurdles Mejia currently faces arise because of Mejia's failure to seek judicial review, or to file a motion to reopen his deportation proceedings, in a timely manner.[5]

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4. The Court in *Richardson* also noted the minor exception to this unified judicial-review process. INA § 242(e)(2) provides a truncated form of habeas review for non-resident aliens summarily denied admission at ports of entry without any removal proceedings. 8 U.S.C. § 1252(e)(2) (Supp.1998).

5. Prior to the AEDPA and IIRIRA, judicial review of deportation orders was available in a petition for review to the court (Cont'd)

Appendix C

As an initial matter, we note the focus of the judicial review currently sought by Mejia. In his § 2241 petition, Mejia does not seek direct judicial review of the 1991 deportation order entered by the immigration judge or the 1994 BIA order affirming the deportation order. Indeed, Mejia indisputably enjoyed the opportunity for direct judicial review of these decisions, but opted to abscond from the INS rather than avail himself of such opportunities. Instead, Mejia seeks a judicial forum in which he can collaterally attack those orders by asserting that his deportation proceedings were tainted by his unconstitutional, and later vacated, state drug conviction. According to Mejia, this claim was unavailable to him until 1997 as a result of the ineffective assistance he received from his counsel during his state criminal proceedings and deportation proceedings.

Thus, the actual focus of Mejia's present attempt to secure judicial review is the BIA's November 1998 denial of Mejia's motion to reopen his deportation proceedings. In his motion to reopen, Mejia asserted generally the same arguments that he asserts in his § 2241 petition — that his counsel was ineffective in his state criminal proceeding and that this deficient representation tainted his deportation proceedings. In his motion to reopen, Mejia also cited case law to support his argument that a reopening of deportation is warranted when suspension of deportation has been denied

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(Cont'd)

of appeals under INA § 106(a)(1), 8 U.S.C. § 1105a(a)(1) (1995). Likewise, under the INA as amended by IIRIRA, judicial review in the court of appeals remains available of a removal order based on the overstay of a student visa. INA § 242(b)(2) & (9), 8 U.S.C. § 1252(b)(2) & (9) (Supp.1998).

based on a criminal conviction which is subsequently vacated.[6] Apparently, the BIA was unpersuaded by these arguments and concluded that its regulations required it to dismiss Mejia's motion as untimely. If any judicial forum exists in which Mejia can assert the arguments rejected by the BIA in its November 1998 order, the proper forum is only in Mejia's petition for review in the court of appeals and not through a § 2241 habeas petition.

As a general principle, judicial review of the BIA's denial of a motion to reopen can be secured through a petition for review. For example, in *Stone v. INS,* 514 U.S. 386, 405-06, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995), the

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6. While Mejia may correctly argue that such changed circumstances warrant the reopening of deportation proceedings, the potential impediment to reopening Mejia's deportation proceedings is not with the substantive merits of Mejia's argument but with the timeliness of his motion. This Court finds nothing inherently unconstitutional about time limits especially in light of a prior opportunity for judicial review. The Supreme Court has recognized the profound importance of ensuring a degree of finality in judicial proceedings. *Calderon v. Thompson,* __ U.S. __, __, 118 S.Ct. 1489, 1501, 140 L.Ed.2d 728 (1998) ("Finality . . . enhances the quality of judging."). Although the Court made this observation in the context of federal collateral review of state criminal proceedings, finality serves similar policies in the context of immigration proceedings. *Saiyid v. INS,* 132 F.3d 1380, 1386 (11th Cir.1998) (denying aliens' petition to remand their case to the BIA in order to allow them to present new evidence about changed circumstances relevant to their application for suspension of deportation because, *inter alia,* the petition to remand was an attempt to circumvent time limits on motions to reopen deportation proceedings).

Supreme Court held that the ninety-day limitations period[7] for filing a petition of review of a final deportation order is not tolled by the filing of a motion for reconsideration in the BIA. In Stone, the alien facing deportation had filed a petition for review within ninety days of the BIA's denial of his motion "to [r]eopen and/or to [r]econsider" but not within ninety days of his final deportation order. *Id.* at 389, 115 S.Ct. 1537. Accordingly, the Supreme Court held that the court of appeals properly exercised jurisdiction over the petition for review to the extent it challenged the BIA's denial of the motion to reopen or for reconsideration and that the court of appeals properly concluded that it lacked jurisdiction over the petition for review of the deportation order itself. *Id.* at 390-91, 115 S.Ct. 1537; *see also Gomez-Gomez v. INS,* 681 F.2d 1347, 1348 (11th Cir.1982) (affirming on a petition for review, the BIA's denial of a motion to reopen which had been filed on June 5, 1981 where the original deportation order had become final in May 1980); *Wiedersperg v. INS,* 896 F.2d 1179, 1182 (9th Cir.1990) (exercising jurisdiction over a petition for review of a BIA order denying a motion to reopen which had been filed seven years after the deportation order became final and the alien had been deported). Thus, several circuits have reversed the BIA's denial of a motion to reopen deportation proceedings.

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7. Under the INA prior to the AEDPA and IIRIRA, an alien facing deportation had to file a petition for review of a deportation order within ninety days of the final order unless deportation was based on a conviction for an aggravated felony, in which case the petition had to be filed within thirty days. INA § 106(a)(1), 8 U.S.C. § 1105a(a)(1) (1995). Under the INA as amended by IIRIRA, all petitions for review must be filed within thirty days. 8 U.S.C. § 1252(b)(1) (Supp.1998).

However, under the INA as amended by IIRIRA, such decisions must be made now only in a petition for review and not through a § 2241 habeas petition.

Therefore, subject to the limitations period in INA § 242(b)(2), Mejia apparently can pursue, and indeed has filed, a petition for review of the BIA's November 1998 denial of his motion to reopen. This Court expresses no opinion on any procedural or substantive hurdles that Mejia's current petition for review may face.[8] Such questions will be resolved by this Court in ruling on Mejia's petition for review.[9]

Specifically, this Court does not decide the parameters of the issues to be decided in ruling on Mejia's petition for

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8. For example, this Court has not decided whether 8 C.F.R. § 3.2 (1998), which now prohibits multiple motions to reopen, precludes a second motion to reopen when the first motion was filed before the effective date of 8 C.F.R. § 3.2 (1998). *Saiyid,* 132 F.3d at 1385 n. 6.

9. We note, without deciding, that Mejia apparently does not face one major potential impediment to pursuing a petition for review that the alien in *Richardson* appeared to face. INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (Supp.1998) provides that "no court shall have jurisdiction to review any final order of removal against" aliens who are removable based on certain criminal offenses. However, in this case, Mejia is facing deportation for overstaying his visa — not for his drug conviction. His conviction merely served as the basis for the immigration judge's order, affirmed by the BIA, to pretermit Mejia's application for suspension of deportation. Therefore, unlike in *Richardson,* INA § 242(a)(2)(C) does not appear to limit Mejia's opportunity to pursue a petition for review in the court of appeals.

review. On the one hand, the petition for review challenging the BIA's denial of Mejia's motion to reopen may focus narrowly on the correctness of the BIA's application of the time limits in 8 C.F.R. § 3.2, which the BIA cited in concluding that Mejia had not filed a timely motion to reopen. On the other hand, Mejia's petition might properly encompass all issues implicated by Mejia's ineffective-assistance-of-counsel arguments. All issues relating to the proper scope of the judicial inquiry triggered by the petition for review that Mejia has filed can only be decided by the panel of this Court that reviews Mejia's petition.

In summary, this Court holds that the district court lacked jurisdiction over Mejia's § 2241 petition because IIRIRA repealed § 2241 jurisdiction over such matters, as recognized in *Richardson,* and that such repeal is not unconstitutional as applied to Mejia.[10]

For the foregoing reasons, we AFFIRM the district court's order dismissing Mejia's § 2241 petition but direct that the district court dismiss the petition for a lack of subject-matter jurisdiction. The stay of Mejia's deportation entered by this Court on March 13, 1998 and continued on March 26, 1998 is VACATED.

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10. As outlined in the history of this case, Mejia filed his first § 2241 petition on September 26, 1997, while his motion to reopen was still pending before the BIA. As this Court recognized in *Richardson,* the INA, as amended by IIRIRA, expressly requires the exhaustion of administrative remedies prior to the judicial review of a removal order. Therefore, this Court notes that Mejia's petition is also subject to dismissal because at the time it was filed, Mejia had not exhausted the available administrative remedies.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND RULING RENEWED MOTION FOR STAY DENIED AS MOOT DATED AND FILED MARCH 12, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-3108-CIV-LENARD

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner,

vs.

JANET RENO, as Attorney General of the United States, and IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

ORDER

This Cause comes before this Court upon Petitioner's renewed motion for stay of deportation (D.E. 23).

On August 2, 1991, an Immigration Judge (IJ) issued an order: (1) deporting Ernesto Alonso Mejia Rodriguez (Mejia) because he overstayed his visa; and (2) declining to suspend Mejia's deportation, pursuant to 8 U.S.C. §1254(a)(1), because it concluded that he was not a person of good moral character due to a Florida state court conviction for cocaine

trafficking. On January 12, 1994, the Board of Immigration Appeals (BIA) affirmed the IJ's ruling. On August 1, 1997, a Florida state court vacated Mejia's cocaine trafficking conviction. On September 23, 1997, the Immigration and Naturalization Service (INS) took Mejia into custody in an effort to execute the IJ's order.

On September 26, 1997, in light of the vacation of his drug conviction, Mejia attempted to file a motion with the immigration court, requesting it to reopen his deportation proceeding and to reconsider its discretionary decision, made pursuant to 8 U.S.C. §1254(a)(1), not to suspend his deportation. The immigration court apparently refused to accept that motion. On the same day, Mejia filed a motion with the BIA to reopen his deportation proceeding and to reconsider its affirmance of the immigration court's August 2, 1991 order. Also on that day, Mejia filed in this Court a petition for habeas corpus, pursuant to 28 U.S.C. §2241, in which he essentially asks the Court to order INS to reopen his deportation proceeding and to reconsider its decision not to suspend his deportation. Along with that petition, Mejia filed in this Court a motion to stay his deportation pending the resolution of his habeas corpus petition. The Court denied that motion twice, and dismissed Mejia's habeas corpus petition without prejudice on November 14, 1997. Mejia subsequently renewed both his petition and his motion to stay deportation.

8 C.F.R. §3.23 addresses motions to reopen and for reconsideration before an immigration court. Subsection (b)(1) of that regulation provides in pertinent part:

Appendix D

> A motion for reconsideration must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later.

8 C.F.R. §3.23(b)(1). The IJ issued his ruling on August 2, 1991. Therefore, pursuant to §3.23(b)(1), Mejia was required to file any motion for reconsideration or to reopen with the immigration court on or before July 31, 1996. He first attempted to file such a motion before the immigration court on September 26, 1997. That motion was therefore time barred by 8 C.F.R. §3.23(b)(1). Nevertheless, in his habeas corpus petition, Mejia essentially invites this Court to direct the immigration court to entertain that motion. This Court must decline that invitation.*

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* Mejia's habeas corpus petition arguably could be construed as a request for this Court to direct the BIA to reopen his deportation proceeding and reconsider its affirmance of the IJ's suspension ruling. Pursuant to 8 C.F.R. §3.23(b)(2) and §3.2(c)(2), however, Mejia was also required to file any motion to reopen or reconsider before the BIA by July 31, 1996. He filed such a motion untimely on September 26, 1997. Therefore, even if Mejia's habeas corpus petition is interpreted to request the Court to direct the BIA rather than than the immigration court to reopen or reconsider, the same conclusion is compelled.

Appendix D

Accordingly, it is hereby ORDERED AND ADJUDGED that:

(1) Petitioner's habeas corpus petition be DISMISSED with prejudice; and

(2) Petitioner's renewed motion for stay of deportation be DENIED as MOOT. The Clerk of Court is directed to close this case.

DONE AND ORDERED in Chambers, at Miami, Florida on this 12 day of March, 1998.

s/ Joan A. Lenard
Joan A. Lenard
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DENYING MOTION FOR RECONSIDERATION AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS WITHOUT PREJUDICE DATED AND FILED NOVEMBER 14, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-3108-CIV-LENARD

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner,

vs.

JANET RENO, as Attorney General of the United States, and IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

ORDER

This Cause comes before this Court upon Petitioner's motion for reconsideration (D.E. 5).

On August 2, 1991, an Immigration Judge (IJ) issued an order: (1) deporting Ernesto Alonso Mejia Rodriguez (Mejia) because he overstayed his visa; and (2) declining to suspend Mejia's deportation, pursuant to 8 U.S.C. §1254(a)(1), because it concluded that he was not a person of good moral character due to a Florida state court conviction for cocaine

trafficking. The Board of Immigration Appeals (BIA) ultimately affirmed the IJ's ruling. On August 1, 1997, a Florida state court vacated Mejia's cocaine trafficking conviction. On September 23, 1997, the Immigration and Naturalization Service (INS) took Mejia into custody in an effort to execute the IJ's order.

On that same day, Mejia filed with the district director of the INS an application for a stay of deportation. Three days later, he filed a motion with the BIA in which he requested that entity both to reopen his deportation proceeding in light of the fact that his drug conviction had been vacated, and to stay his deportation pending adjudication of that motion. Mejia attempted to file the identical motion with an IJ, but the immigration court apparently refused to accept the motion while the same motion was pending before the BIA. On September 26, 1997, Mejia filed in this Court a petition for habeas corpus, pursuant to 28 U.S.C. §2241, in which he asks the Court, inter alia, to stay his deportation and order the INS to reconsider his application for a suspension of deportation. Along with that petition, Mejia filed in this Court a motion to stay his deportation. The Court denied that motion, and Mejia now asks the Court to reconsider its ruling.

Courts have held that the district director of the INS, and not merely the BIA or an IJ, must deny an alien's request for a stay of deportation before that alien can file a habeas corpus petition in a federal district court. *See Kyei v. I.N.S.*, 65 F.3d 279, 281 (2nd Cir. 1995); *Garay v. Slattery*, 23 F.3d 744, 745-46) (2nd Cir. 1994); *Denisenko v. Reno*, 1996 WL 467305, *3 (N.D. Fla.). The record in the instant case does

not contain any indication that the district director of the INS has ruled on Mejia's application for a stay of deportation. Mejia's habeas corpus petition is therefore premature.

Accordingly, it is hereby ORDERED AND ADJUDGED that:

(1) Mejia's motion for reconsideration of this Court's October 7, 1997 order denying Mejia's motion for stay, be DENIED; and

(2) Mejia's habeas corpus petition be DISMISSED without prejudice. The Clerk of Court is directed to close this case.

DONE AND ORDERED in Chambers, at Miami, Florida on this 14 day of November, 1997.

s/ Joan A. Lenard
Joan A. Lenard
United States District Judge

APPENDIX F — DECISION OF THE UNITED STATES DEPARTMENT OF JUSTICE, BOARD OF IMMIGRATION APPEALS DISMISSING APPEAL AND AFFIRMING DECISION OF IMMIGRATION JUDGE DATED JANUARY 12, 1994

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A29 362 615 — Miami Date: JAN 12 1994

In re: ERNESTO ALONSO *MEJIA*-RODRIGUEZ

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Mary E. Kramer, Esquire
561 NE 79th Street, Suite 212A
Miami, Florida 33138

ON BEHALF OF SERVICE:

Pedro Miranda
General Attorney

Appendix F

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] — Convicted of controlled substance violation

Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] — Entered without inspection

Lodged: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] — Nonimmigrant — remained longer than permitted

APPLICATION: Termination of proceedings; suspension of deportation

In a decision dated August 2, 1991, an immigration judge found the respondent to be deportable on the lodged charge set forth above, granted the Immigration and Naturalization Service's ("the Service") motion to pretermit the respondent's application for suspension of deportation, and ordered the respondent's deportation to Honduras. The respondent has appealed.[1] The appeal will be dismissed.

The respondent is a 28-year-old native and citizen of Honduras. He was admitted to the United States as a

1. The record reflects that the respondent's request for oral argument before the Board was granted. *See* 8 C.F.R. § 3.1(e). However, respondent's counsel subsequently informed the Board that she would not be able to attend.

nonimmigrant visitor on November 7, 1980. On October 4, 1989, the Service granted the respondent's request for nonimmigrant status of a student, with permission to remain until August 1990. On March 8, 1990, the Service issued an Order to Show Cause (Form I-221; Exh. 1) against the respondent, charging him with deportability pursuant to former sections 241(a)(2) and 241(a)(11) of the Act,[2] 8 U.S.C. §§ 1251(a)(2) and 1251(a)(11), as an alien who had entered without inspection and who had been convicted of a controlled substance violation.

On December 6, 1990, the Service filed a lodged charge against the respondent charging him with deportability pursuant to former section 241(a)(2) of the Act, as a nonimmigrant who had remained beyond August 1990 without the permission of the Service. Moreover, at a deportation hearing on January 24, 1991, the Service indicated that it wished to withdraw the charge of deportation pursuant to former section 241(a)(11) of the Act. The proceedings were then continued pending the respondent's submission of an application for suspension of deportation.

On July 25, 1991, the Service filed a motion to pretermit consideration of the respondent's suspension application, and to lodge a charge of deportability against the respondent pursuant to section 241(a)(2)(B)(i) of the Act. The Service also produced evidence that on July 24, 1986, in the Circuit

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2. The immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, revised and redesignated the grounds of deportation in the Act. The revisions, however, do "not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991." *Id.* at section 602(d).

Court, in and for Dade County, Florida, the Court entered an order withholding adjudication following the respondent's plea of nolo contendere to the charge of trafficking in cocaine. The respondent was committed to the custody of the Department of Corrections for a period of 3 years, pursuant to Florida Statute 958. The record also contains an order from the Dade County Circuit Court, dated December 6, 1990, sealing the respondent's criminal record pursuant to Florida Statutes section 943.058 (Exh. 4).

Following a full hearing on August 2, 1991, the immigration judge determined that the respondent was deportable under the lodged charge as a nonimmigrant overstay (I.J. at 2). The immigration judge further concluded that the July 1986 "order withholding adjudication" constituted a "conviction" under the immigration laws (I.J. at 2). The immigration judge considered the conviction only for the purpose of finding that the respondent was ineligible for suspension of deportation, and not for the purpose of finding deportability against the respondent pursuant to section 241(a)(2)(B)(i) of the Act (I.J. at 2). The immigration judge ultimately concluded that the respondent was deportable as a nonimmigrant overstay and that he was ineligible for any relief from deportation. He consequently ordered the respondent's deportation to Honduras. This appeal followed.

On appeal, the respondent argues first that the immigration judge erroneously found him to be deportable as a nonimmigrant overstay pursuant to former section 241(a)(2). The respondent contends next that the immigration judge erred by denying his request for a continuance in order

to respond to the Service's motion to pretermit the suspension of deportation application. The respondent submits too that his "conviction" should not form the basis for ineligibility for suspension of deportation, considering that the Service initially withdrew the charge of deportability based on a controlled substance conviction. Finally, the respondent asserts that the Dade County Circuit Court's "order withholding adjudication" should not constitute a "conviction" which renders him ineligible for relief from deportation.

We find that the immigration judge properly concluded that the respondent is deportable as a nonimmigrant overstay. The respondent admitted that he did not have permission from the Service to remain in the United States beyond August 1990. In *Matter of Varughese*, 17 I&N Dec. 399, 401 (BIA 1980), we stated: "In order to establish an alien's deportability as an 'overstay,' the Service need only show that the alien was admitted as a nonimmigrant '. . . for a temporary period, that the period has elapsed, and that the nonimmigrant has not departed.' [citation omitted]." Here, the respondent has conceded that he was admitted as a nonimmigrant student in October 1989, and that he did not have permission to remain after August 1990. We accordingly find that the respondent's deportability under former section 241(a)(2) of the Act has been established by clear, unequivocal, and convincing evidence. *Woodby v. INS*, 385 U.S. 276 (1966).[3]

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3. We note that the respondent argues that he cannot be charged as a nonimmigrant overstay under the Immigration Act of 1990, *supra*, because he had notice of the charge against him before March

(Cont'd)

The respondent contends that under section 242(b) of the Act, 8 U.S.C. § 1252(b), which provides that an alien must have a "reasonable opportunity to be present" at his deportation hearing, he had a legal basis to remain in the United States beyond August 1990. This is a frivolous argument. The fight to be present at a deportation hearing does not reinstate a lawful status for a nonimmigrant who has overstayed his visa. As discussed above, the respondent did not obtain permission from the Service to remain beyond August 1990, and he therefore was properly found to be deportable as a nonimmigrant overstay.

The respondent's next argument is that the immigration judge should have granted him a continuance so that he could respond to the Service's motion to pretermit his application for suspension of deportation. The record reflects that the Service's motion was filed on July 25, 1991, and that the parties discussed the motion at the deportation hearing on August 2, 1991. The respondent contends that because of the complexity of the issue of whether the respondent had been "convicted" under the immigration laws, the immigration judge should have granted him a continuance so that he could prepare a response to the Service's motion.

We find that the respondent has waived his argument regarding a request for a continuance. The record reflects

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(Cont'd)

1, 1991. Respondent's brief at 5. While we agree with this contention, we observe that the Service did not charge the respondent with deportability as a nonimmigrant overstay under the 1990 Act, and the immigration judge clearly found the respondent to be deportable under former section 241(a)(2) of the Act (I.J. at 1-2).

that respondent's counsel stated twice at the deportation hearing on August 1, 1991, that she did not want a continuance and that the respondent wished to proceed with the hearing (Tr. at 54, 61). Under these circumstances, where the respondent's counsel withdrew the continuance request before the immigration judge, we conclude that the respondent has waived any argument regarding a continuance motion.

The final issue raised by the respondent concerns the immigration judge's decision to pretermit the respondent's application for suspension of deportation, based on his finding that the respondent had been convicted of a controlled substance violation under Florida law. The immigration judge applied the 3-part test in *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988), and concluded that the respondent had been convicted under the immigration laws (I.J. at 2). According to *Ozkok*, when adjudication of guilt has been withheld, a conviction will be found where the alien has pleaded guilty or nolo contendere or was found guilty, the judge ordered some form of punishment to be imposed, and a judgment or adjudication of guilt may be entered without further proceedings regarding guilt or innocence if the person violated the terms of his probation. We agree with the immigration judge's assessment that the evidence in the record concerning the respondent's criminal record establishes that he has been convicted under the 3-part test set forth in *Ozkok*.

The respondent argues that the 1986 order of the Dade County Circuit withholding adjudication against him should not be considered as a "conviction" because his criminal

proceedings occurred under Florida's equivalent of the federal first offender statute. The respondent's criminal record reflects, though, that he entered a plea of nolo contendere to the charge of "trafficking in cocaine" (Exh. 3). The ameliorative provisions of the federal first offender statute were only available to persons convicted of simple possession of a controlled substance. *See Matter of Deris*, Interim Decision 3102 (BIA 1989). Because the respondent entered a plea to the charge of trafficking in cocaine, he does not qualify for the federal first offender exemption.

Furthermore, the respondent argues that he should not be considered ineligible for relief under section 244(a)(2) of the Act, since the Service withdrew the charge of deportability under former section 241(a)(11) of the Act, and the immigration judge ultimately did not find the respondent to be deportable as an alien who had a controlled substance conviction. In view of our conclusion above that the respondent has been "convicted" of a controlled substance violation, however, we also conclude that the respondent falls within the category of aliens described in section 244(a)(2) of the Act, 8 U.S.C. § 1254(a)(2), who are deportable due to a conviction for a drug offense. To permit the respondent to apply for suspension of deportation merely because the immigration judge did not reach the issue of the respondent's deportability as an alien convicted of a controlled substance violation "would be to elevate form over substance." *Mullen-Cofee v. INS*, 976 F.2d 1375, 1379 (11th Cir. 1992). An explicit finding of deportability under former section 241(a)(11) is not a prerequisite to a determination that an alien is ineligible for relief under section 244(a)(2) of the Act. *See id.*

Appendix F

Accordingly, we conclude that the decision of the immigration judge finding the respondent to be deportable as a nonimmigrant overstay, denying his application for suspension of deportation, and ordering his deportation to Honduras, was correct. The respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

s/ Mary Maguire Dunne
FOR THE BOARD

APPENDIX G — MEMORANDUM OF ORAL DECISION AND ORDER OF DEPORTATION OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DATED AUGUST 2, 1991

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
MIAMI, FLORIDA

Case No. A29-363-615

Date: August 2, 1991

IN THE MATTER OF:

Ernesto Alonso Mejia Rodriguez

RESPONDENT(S)

IN DEPORTATION PROCEEDINGS

MEMORANDUM OF ORAL DECISION

This is a summary of the oral decision entered on August 2, 1991. If the decision is appealed the full text of oral decision will be transcribed and will become the official decision in these proceedings.

✓ The Respondent has been found to be subject to deportation under Section(s) 241(a)(2) of the Immigration and Nationality Act.

Appendix G

✓ The Respondent was ordered deported to Honduras.

* * *

___ The Respondent was denied relief under Section(s) 244(a)(1)(2) & (e) of the Immigration and Nationality Act.

* * *

✓ The Respondent has reserved appeal.

* * *

s/ Michael C. Horn
Michael C. Horn
Immigration Judge

Appendix G

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Miami, Florida

File No.: A 29 362 615

August 2, 1991

In the Matter of

ERNESTO MEJIA RODRIGUEZ

Respondent

IN DEPORTATION PROCEEDINGS

CHARGE:

APPLICATIONS:

ON BEHALF OF RESPONDENT:

Kathy Hamilton, Esq.
Mary Kramer, Esq.

ON BEHALF OF SERVICE:

Eduardo Ortiz-Delgado, Esq.

Appendix G

ORAL DECISION OF THE IMMIGRATION JUDGE

The case appears before the Immigration Court upon the Immigration Service filing an Order to Show Cause and, also, additional charges of deportability. The Court, based upon pleadings in regards to those issues, has made a determination under Exhibit 2, the additional charges of deportability, that this respondent is subject to deportation under Section 241(a)(2) of the Act in that, after his admission as a non-immigrant, he has remained in the United States for a longer time than permitted.

He has admitted to being a native and citizen of Honduras. He was admitted into the United States as a non-immigrant visitor for pleasure on November 7, 1980. October 4, 1989, his status was reinstated to a non-immigrant student. He was authorized to remain until August of 1990. He has remained in the United States, thereafter, without the authority of the Immigration Service. He has filed, as a form of relief from deportation, an application for suspension of deportation. The Court has received from the Immigration Service a motion to pretermit as to that relief.

There has been strong objection to the consideration of Exhibit 3, the documents which this Court has found to constitute conviction of this respondent before the Circuit Court in the state of Florida, Dade County, trafficking in cocaine. Court has received Exhibit 3, the conviction documents, and I have set forth in detail on the record exactly what constitutes Exhibit 3. The Court finds that, over the objection of counsel for the respondent, that they are to be received and that they do constitute a conviction as

understood within the meaning of *Matter of Ozkok*. The Court is aware and finds, specifically, that these conviction records are not being introduced in regards to a charge of deportation. They are being introduced by the Immigration Service to pretermit the application for suspension of deportation.

Under the application for suspension of deportation, which is requested under Section 244 of the Act, under Sub-Section 1 and, also, Sub-Section 2, which is arguably the controlling Section in this case, but under both Sections this individual must be a person of good moral character for seven years under Sub-Section 1 preceding the application and under Sub-Section 2 for the ten year period following the Act constituting the ground for deportation. So even if we were to assume that we were moving under Sub-Section 1, there was not a ground for deportation. This individual must be a person of good moral character for seven years prior to his application date of February of 1991. His convictions occurred in 1986. He clearly has not met that provision and he is not a person of good, moral character.

Counsel for the respondent has argued that there should be an exception made because of the conviction occurring as Exhibit 3 sets forth under the sentence document wherein it is stated, "It is further considered, ordered, and adjudged that the defendant is hereby classified as a youthful offender under the provisions of Chapter 958 of the Florida statutes. Now it has been argued, as I was saying, that, because of that, that the Court should not consider the conviction records in precluding this individual from any relief from the Court. The Court finds that that argument is not appropriate. The Court has received Exhibit 3 into the record for the purpose,

the sole purpose, of making a determination as to whether or not the respondent is a person of good, moral character under the law. Upon review of Exhibit 3, wherein the respondent was found guilty of trafficking in cocaine and sentenced to three years, one year of imprisonment, two years of community control, it is clear to the Court that this individual is not a person of good moral character.

It is understood within the meaning of Section 244 as it relates to Section 101(f) of the Act and, therefore, this individual is not entitled to relief under suspension of deportation. Further, he is not entitled to any other relief before this Court and, based upon his conviction, because he is not a person of good moral character, no other relief is being requested from the Court.

ORDER

IT IS HEREBY THE ORDER of the Court that this individual be deported from the United States to Honduras, his native country.

s/ Michael Horn
MICHAEL HORN
Immigration Judge

APPENDIX H — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 29, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-4426-GG

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner-Appellant,

versus

JANET RENO, as Attorney General of the United States, and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

---

No. 98-5878-GG

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Appendix H

Petition for Review from the
Board of Immigration Appeals

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: CARNES and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

APPENDIX I — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

U.S. Const., Amend. VI

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

* * *

Appendix I

8 U.S.C. § 1105a (1995)

§ 1105a. Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that —

(1) Time for filing petition

A petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony (including an alien described in section 1252a of this title), not later than 30 days after the issuance of such order;

(2) Venue

The venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined

in this chapter, of the petitioner, but not in more than one circuit;

(3) Respondent; service of petition; stay of deportation

The action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs or unless the alien is convicted of an aggravated felony (including an alien described in section 1252a of this title), in which case the Service shall not stay the deportation of the alien pending determination of the petition of the court unless the court otherwise directs;

(4) Determination upon administrative record

Except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) Claim of nationality; determination or transfer to district court for hearing de novo

Whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of Title 28. Any such petitioner shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise;

(6) Consolidation

Whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order;

(7) Challenge of validity of deportation order in criminal proceeding; motion for judicial review before trial; hearing de novo on nationality claim; determination of motion; dismissal of indictment upon invalidity of order; appeal

Appendix I

If the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of Title 28. Any such alien shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 1252 of this title;

Appendix I

(8) Deferment of deportation; compliance of alien with other provisions of law; detention or taking into custody of alien

Nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 1252 of this title. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 1252 of this title at any time after the issuance of a deportation order;

(9) Typewritten record and briefs

It shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(10) Habeas corpus

Any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

Appendix I

(b) Limitation of certain aliens to habeas corpus proceedings

Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

(d) Petition contents

(1) A petition for review or for habeas corpus on behalf of an alien against whom a final order of

deportation has been issued pursuant to section 1252a(b) of this title may challenge only —

(A) whether the alien is in fact the alien described in the order;

(B) whether the alien is in fact an alien described in section 1252a(b)(2) of this title;

(C) whether the alien has been convicted of an aggravated felony and such conviction has become final; and

(D) whether the alien was afforded the procedures required by section 1252a(b)(4) of this title.

(2) No court shall have jurisdiction to review any issue other than an issue described in paragraph (1).

* * *

8 U.S.C. § 1182(a)(2)(A) (1995)

§ 1182. Excludable aliens

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to

receive visas and who shall be excluded from admission into the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as

defined in section 802 of Title 21),

is excludable.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if —

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the

alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

* * *

8 U.S.C. 1182(c) (1995)

§ 1182. Excludable aliens

* * *

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent resident who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without

regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

* * *

8 U.S.C. § 1187

§ 1187. Visa waiver pilot program for certain visitors

(a) Establishment of pilot program

The Attorney General and the Secretary of State are authorized to establish a pilot program (hereinafter in this section referred to as the "pilot program") under which the requirement of paragraph (7)(B)(i)(II) of section 1182(a) of this title may be waived by the Attorney General, in consultation with the Secretary of State and in accordance with this section, in the case of an alien who meets the following requirements:

(1) Seeking entry as tourist for 90 days or less

The alien is applying for admission during the pilot program period (as defined in subsection (e)) as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) for a period not exceeding 90 days.

Appendix 1

(2) National of pilot program country

The alien is a national of, and presents a passport issued by, a country which —

(A) extends (or agrees to extend) reciprocal privileges to citizens and nationals of the United States, and

(B) is designated as a pilot program country under subsection (c) of this section.

(3) Executes immigration forms

The alien before the time of such admission completes such immigration forms as the Attorney General shall establish.

(4) Entry into the United States

If arriving by sea or air, the alien arrives at the port of entry into the United States on a carrier which has entered into an agreement with the Service to guarantee transport of the alien out of the United States if the alien is found inadmissible or deportable by an immigration officer.

(5) Not a safety threat

The alien has been determined not to represent a threat to the welfare, health, safety, or security of the United States.

(6) No previous violation

If the alien previously was admitted without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant.

(7) Round-trip ticket

The alien is in possession of a round-trip transportation ticket (unless this requirement is waived by the Attorney General under regulations).

(b) Waiver of rights

An alien may not be provided a waiver under the pilot program unless the alien has waived any right —

(1) to review or appeal under this chapter of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or

(2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.

(c) Designation of pilot program countries

(1) In general

The Attorney General, in consultation with the Secretary of State, may designate any country as a

pilot program country if it meets the requirements of paragraph (2).

(2) Qualifications

Except as provided in subsection (g) of this section, a country may not be designated as a pilot program country unless the following requirements are met:

(A) Low nonimmigrant visa refusal rate — Either —

(i) the average number of refusals of nonimmigrant visitor visas for nationals of that country during —

(I) the two previous full fiscal years was less than 2.0 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during those years; and

(II) either of such two previous full fiscal years was less than 2.5 percent of the total number of nonimmigrant visitor visas for nationals of that country which were

granted or refused during that year; or

(ii) such refusal rate for nationals of that country during the previous full fiscal year was less than 3.0 percent.

(B) Machine readable passport program

The government of the country certifies that it has or is in the process of developing a program to issue machine-readable passports to its citizens.

(C) Law enforcement interests

The Attorney General determines that the United States law enforcement interests would not be compromised by the designation of the country.

(3) Continuing and subsequent qualifications

For each fiscal year (within the pilot program period) after the initial period —

(A) Continuing qualification

In the case of a country which was a pilot program country in the previous fiscal year, a country may not be designated as a pilot program country unless the sum of —

(i) the total of the number of nationals of that country who were denied admission at the time of arrival or withdrew their application for admission during such previous fiscal year as a nonimmigrant visitor, and

(ii) the total number of nationals of that country who were admitted as nonimmigrant visitors during such previous fiscal year and who violated the terms of such admission,

was less than 2 percent of the total number of nationals of that country who applied for admission as nonimmigrant visitors during such previous fiscal year.

(B) New countries

In the case of another country, the country may not be designated as a pilot program country unless the following requirements are met:

(i) Low nonimmigrant visa refusal rate in previous 2-year period

The average number of refusals of nonimmigrant visitor visas for

nationals of that country during the two previous full fiscal years was less than 2 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during those years.

(ii) Low nonimmigrant visa refusal rate in each of the 2 previous years

The average number of refusals of nonimmigrant visitor visas for nationals of that country during either of such two previous full fiscal years was less than 2.5 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during that year.

(4) Initial period

For purposes of paragraphs (2) and (3), the term "initial period" means the period beginning at the end of the 30-day period described in subsection (b)(1) of this section and ending on the last day of the first fiscal year which begins after such 30-day period.

(d) Authority

Notwithstanding any other provision of this section, the Attorney General, in consultation with the Secretary of State, may for any reason (including national security) refrain from waiving the visa requirement in respect to nationals of any country which may otherwise qualify for designation or may, at any time, rescind any waiver or designation previously granted under this section.

(e) Carrier agreements

(1) In general

The agreement referred to in subsection (a)(4) of this section is an agreement between a carrier and the Attorney General under which the carrier agrees, in consideration of the waiver of the visa requirement with respect to a nonimmigrant visitor under the pilot program —

(A) to indemnify the United States against any costs for the transportation of the alien from the United States if the visitor is refused admission to the United States or remains in the United States unlawfully after the 90-day period described in subsection (a)(1)(A) of this section,

(B) to submit daily to immigration officers any immigration forms received with respect to nonimmigrant visitors provided a waiver under the pilot program, and

(C) to be subject to the imposition of fines resulting from the transporting into the United States of a national of a designated country without a passport pursuant to regulations promulgated by the Attorney General.

(2) Termination of agreements

The Attorney General may terminate an agreement under paragraph (1) with five days' notice to the carrier for the carrier's failure to meet the terms of such agreement.

(f) Definition of pilot program period

For purposes of this section, the term "pilot program period" means the period beginning on October 1, 1988, and ending on April 30, 2000.

(g) Duration and termination of designation

(1) In general

(A) Determination and notification of disqualification rate

Upon determination by the Attorney General that a pilot program country's disqualification rate is 2 percent or more, the Attorney General shall notify the Secretary of State.

(B) Probationary status

If the program country's disqualification rate is greater than 2 percent but less than 3.5 percent, the Attorney General shall place the program country in probationary status for a period not to exceed 2 full fiscal years following the year in which the determination under subparagraph (A) is made.

(C) Termination of designation

Subject to paragraph (3), if the program country's disqualification rate is 3.5 percent or more, the Attorney General shall terminate the country's designation as a pilot program country effective at the beginning of the second fiscal year following the fiscal year in which the determination under subparagraph (A) is made.

(2) Termination of probationary status

(A) In general

If the Attorney General determines at the end of the probationary period described in paragraph (1)(B) that the program country placed in probationary status under such paragraph has failed to develop a machine-

readable passport program as required by section (c)(2)(C) of this section, or has a disqualification rate of 2 percent or more, the Attorney General shall terminate the designation of the country as a pilot program country. If the Attorney General determines that the program country has developed a machine-readable passport program and has a disqualification rate of less than 2 percent, the Attorney General shall redesignate the country as a pilot program country.

(B) Effective date

A termination of the designation of a country under subparagraph (A) shall take effect on the first day of the first fiscal year following the fiscal year in which the determination under such subparagraph is made. Until such date, nationals of the country shall remain eligible for a waiver under subsection (a) of this section.

(3) Nonapplicability of certain provisions

Paragraph (1)(C) shall not apply unless the total number of nationals of a pilot program country described in paragraph (4)(A) exceeds 100.

Appendix I

(4) Definition of disqualification rate

For purposes of this subsection, the term "disqualification rate" means the percentage which —

(A) the total number of nationals of the pilot program country who were —

(i) denied admission at the time of arrival or withdrew their application for admission during the most recent fiscal year for which data are available; and

(ii) admitted as nonimmigrant visitors during such fiscal year and who violated the terms of such admission; bears to

(B) the total number of nationals of such country who applied for admission as nonimmigrant visitors during such fiscal year.

* * *

Appendix I

8 U.S.C. § 1226

§ 1226. Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General —

(1) may continue to detain the arrested alien; and

(2) may release the alien on —

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a) of this section, rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who —

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system —

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local

authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available —

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall

provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

* * *

8 U.S.C. § 1251 (1995)

§ 1251. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens:

(1) Excludable at time of entry or of adjustment of status or violates status

(A) Excludable aliens

Any alien who at the time of entry or adjustment of status was within one or more

of the classes of aliens excludable by the law existing at such time is deportable.

(B) Entered without inspection

Any alien who entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or any other law of the United States is deportable.

(C) Violated nonimmigrant status or condition of entry

(i) Nonimmigrant status violators

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry

Any alien whom the Secretary of Health and Human Services

certifies has failed to comply with terms, conditions, and controls that were imposed under section 1182(g) of this title is deportable.

(D) Termination of conditional permanent residence

(i) In general

Any alien with permanent resident status on a conditional basis under section 1186a of this title (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 1186b of this title (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception

Clause (i) shall not apply in the cases described in section 1186a(c)(4) of this title (relating to certain hardship waivers).

Appendix I

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's

spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(F) Failure to maintain employment

Any alien who obtains the status of an alien lawfully admitted for temporary residence under section 1161 of this title who fails to meet the requirement of section 1161(d)(5)(A) of this title by the end of the applicable period is deportable.

(G) Marriage fraud

An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 1182(a)(6)(C)(i) of this title) and to be in the United States in violation of this chapter (within the meaning of subparagraph (B)) if —

(i) the alien obtains any entry into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such entry of the alien and which, within 2 years subsequent to any entry of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General

was made for the purpose of procuring the alien's entry as an immigrant.

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens, described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who —

(i) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

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A waiver of deportation for fraud or misrepresentation granted under this subparagraph shall also operate to waive deportation based on the grounds of inadmissibility at entry directly resulting from such fraud or misrepresentation.

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who —

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(i) of this title) after the date of entry, and

(II) either is sentenced to confinement or is confined therefor in a prison or correctional institution for one year or longer,

is deportable.

Appendix 1

(ii) Multiple criminal convictions

Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after entry is deportable.

(iv) Waiver authorized

Clauses (i), (ii), and (iii) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

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(B) Controlled substances

(i) Conviction

Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after entry has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory

which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate —

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18, for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of Title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

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(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 1305 of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted —

(i) under section 1306(c) of this title or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of Title 18 (relating to fraud and misuse of visas, permits, and other entry documents),

is deportable.

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(C) Document fraud

Any alien who is the subject of a final order for violation of section 1324c of this title is deportable.

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after entry engages in —

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is deportable.

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(B) Terrorist activities

Any alien who has engaged, is engaged, or at any time after entry engages in any terrorist activity (as defined in section 1182(a)(3)(B)(iii) of this title) is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to excludability under section 1182(a)(3)(C)(i) of this title.

(D) Assisted in Nazi persecution or engaged in genocide

Any alien described in clause (i) or (ii) of section 1182(a)(3)(E) of this title is deportable.

(5) Public charge

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

(b) Deportation of certain nonimmigrants

An alien, admitted as a nonimmigrant under the provisions of either section 1101(a)(15)(A)(i) or 1101(a)(15)(G)(i) of this title, and who fails to maintain a status under either of those provisions, shall not be required to depart from the United States without the approval of the Secretary of State, unless such alien is subject to deportation under paragraph (4) of subsection (a) of this section.

(c) Waiver of grounds for deportation

Paragraphs (1)(A), (1)(B), (1)(C), (1)(D), and (3)(A) of subsection (a) of this section (other than so much of paragraph (1) as relates to a ground of exclusion described in paragraph (2) or (3) of section 1182(a) of this title) shall not apply to a special immigrant described in section 1101(a)(27)(J) of this title based upon circumstances that

existed before the date the alien was provided such special immigrant status.

(d) Repealed. Pub.L. 102-232, Title III, § 307(k)(1), Dec. 12, 1991, 105 Stat. 1756

(e) Redesignated (b)

(f), (g) Repealed. Pub.L. 101-649, § 602(b)(1), Nov. 29, 1990, 104 Stat. 5081

(h) Redesignated (c)

* * *

8 U.S.C. § 1252

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

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(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law, no court shall have jurisdiction to review —

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement

the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law, no court shall have jurisdiction to review —

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this

title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

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(4) Scope and standard for review

Except as provided in paragraph (5)(B) —

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the

petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

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(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that —

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of Title 28, United States Code.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

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(8) Construction

This subsection —

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g) of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal —

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if —

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may —

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to

an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of —

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the

Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of —

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the

date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner —

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien

lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain

the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

* * *

Appendix I

8 U.S.C. § 1254 (1995)

§ 1254. Suspension of deportation

(a) Adjustment of status for permanent residence; contents

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 1251(a)(4)(D) of this title) who applies to the Attorney General for suspension of deportation and —

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

(2) is deportable under paragraph (2), (3), or (4) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status,

constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(3) is deportable under any law of the United States except section 1251(a)(1)(G) of this title and the provisions specified in paragraph (2); has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application; has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and proves that during all of such time in the United States the alien was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.

(b) Continuous physical presence not required because of honorable service in Armed Forces and presence upon entry into service

(1) The requirement of continuous physical presence in the United States specified in paragraphs (1) and (2) of subsection (a) of this section shall not be applicable to an alien who (A) has served for a minimum period of twenty-four months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and (B) at the time of his enlistment or induction was in the United States.

(2) An alien shall not be considered to have failed to maintain continuous physical presence in the United States under paragraphs (1) and (2) of subsection (a) if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence.

(c) Fulfillment of requirements of subsection (a); report to Congress

Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien.

(d) Record of cancellation of deportation

Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made.

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(e) Voluntary departure

(1) Except as provided in paragraph (2), the Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (2), (3) or (4) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

(2) The authority contained in paragraph (1) shall not apply to any alien who is deportable because of a conviction for an aggravated felony.

(f) Alien crewmen; nonimmigrant exchange aliens admitted to receive graduate medical education or training; other

The provisions of subsection (a) of this section shall not apply to an alien who —

(1) entered the United States as a crewman subsequent to June 30, 1964;

(2) was admitted to the United States as a nonimmigrant exchange alien as defined in section

1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title; or

(3)(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training, (B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and (C) has not fulfilled that requirement or received a waiver thereof.

(g) Consideration of evidence

In acting on applications under subsection (a)(3) of this section, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

* * *

Appendix I

8 U.S.C. § 1326

§ 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who —

> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection —

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence; or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment.

Any alien deported pursuant to section 1252(h)(2) of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) of this section unless the alien demonstrates that —

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

* * *

28 U.S.C. § 2241

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless —

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

* * *

Appendix I

28 U.S.C. § 2244

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless —

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the

evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody

pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted

toward any period of limitation under this subsection.

* * *

28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —

> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> > (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure

of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue

made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —

(A) the claim relies on —

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the

applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

* * *

Appendix I

28 U.S.C. § 2255

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

Appendix I

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain —

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

* * *

Appendix I

8 C.F.R. § 3.2

§ 3.2 Reopening or reconsideration before the Board of Immigration Appeals.

(a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

(b) Motion to reconsider.

(1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. A motion to reconsider a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, may be deemed a motion to remand the decision for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with,

and considered by the Board in connection with the appeal to the Board.

(2) A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision or on or before July 31, 1996, whichever is later. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider. In removal proceedings pursuant to section 240 of the Act, an alien may file only one motion to reconsider a decision that the alien is removable from the United States.

(3) A motion to reconsider based solely on an argument that the case should not have been affirmed without opinion by a single Board Member, or by a three-Member panel, is barred.

(c) Motion to reopen.

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have

been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the

final administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 3.23(b)(4)(ii). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of § 3.23(b)(4)(iii)(A)(1) or § 3.23(b)(4)(iii)(A)(2);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 208.22(f) of this chapter.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

(d) Departure, deportation, or removal. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

(e) Judicial proceedings. Motions to reopen or reconsider shall state whether the validity of the exclusion, deportation, or removal order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. In any case in which an exclusion, deportation, or removal order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the order is also the subject of any pending criminal proceeding under the Act, and, if so, the current status of that proceeding. If a motion to reopen or reconsider seeks

discretionary relief, the motion shall include a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is being filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution.

(f) Stay of deportation. Except where a motion is filed pursuant to the provisions of §§ 3.23(b)(4)(ii) and 3.23(b)(4)(iii)(A), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Judge, or an authorized officer of the Service.

(g) Filing procedures.

(1) English language, entry of appearance, and proof of service requirements. A motion and any submission made in conjunction with a motion must be in English or accompanied by a certified English translation. If the moving party, other than the Service, is represented, Form EOIR-27, Notice of Entry of Appearance as Attorney or Representative Before the Board, must be filed with the motion. In all cases, the motion shall include proof of service on the opposing party of the motion and all attachments. If the moving party is not the Service, service of the motion shall be made upon the Office of the District Counsel for the district in which the case was completed before the Immigration Judge.

Appendix I

(2) Distribution of motion papers.

(i) A motion to reopen or motion to reconsider a decision of the Board pertaining to proceedings before an Immigration Judge shall be filed directly with the Board. Such motion must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 3.8. The record of proceeding pertaining to such a motion shall be forwarded to the Board upon the request or order of the Board.

(ii) A motion to reopen or a motion to reconsider a decision of the Board pertaining to a matter initially adjudicated by an officer of the Service shall be filed with the officer of the Service having administrative control over the record of proceeding.

(iii) If the motion is made by the Service in proceedings in which the Service has administrative control over the record of proceedings, the record of proceedings in the case and the motion shall be filed directly with the Board. If such motion is filed directly with an office of the Service, the entire record of proceeding shall be forwarded to the Board by the Service officer promptly upon receipt of the briefs

of the parties, or upon expiration of the time allowed for the submission of such briefs.

(3) Briefs and response. The moving party may file a brief if it is included with the motion. If the motion is filed directly with the Board pursuant to paragraph (g)(2)(i) of this section, the opposing party shall have 13 days from the date of service of the motion to file a brief in opposition to the motion directly with the Board. If the motion is filed with an office of the Service pursuant to paragraph (g)(2)(ii) of this section, the opposing party shall have 13 days from the date of filing of the motion to file a brief in opposition to the motion directly with the office of the Service. In all cases, briefs and any other filings made in conjunction with a motion shall include proof of service on the opposing party. The Board, in its discretion, may extend the time within which such brief is to be submitted and may authorize the filing of a brief directly with the Board. A motion shall be deemed unopposed unless a timely response is made. The Board may, in its discretion, consider a brief filed out of time.

(h) Oral argument. A request for oral argument, if desired, shall be incorporated in the motion to reopen or reconsider. The Board, in its discretion, may grant or deny requests for oral argument.

(i) Ruling on motion. Rulings upon motions to reopen or motions to reconsider shall be by written order. If the order directs a reopening and further proceedings are necessary,

the record shall be returned to the Immigration Court or the officer of the Service having administrative control over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.

* * * *

Appendix I

IIRIRA § 309, PUB.L. NO. 104-208, 110 STAT. 3009 8 U.S.C. § 1101 NOTE

SEC. 309. EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL. — Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

(b) PROMULGATION OF REGULATIONS. — The Attorney General shall first promulgate regulations to carry out this subtitle by not later than 30 days before the title III-A effective date.

(c) TRANSITION FOR ALIENS IN PROCEEDINGS. —

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY. — Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date —

(A) the amendments made by this subtitle shall not apply and,

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

(2) ATTORNEY GENERAL OPTION TO ELECT TO APPLY NEW PROCEDURES. — In a case described in paragraph (1) in which an evidentiary hearing under section 236 or 242 or 242B of the Immigration and Nationality Act has not commenced as of the title III-A effective date, the Attorney General may elect to proceed under chapter 4 of title II of such Act (as amended by this subtitle). The Attorney General shall provide notice of such election to the alien involved not later than 30 days before the date any evidentiary hearing is commenced. If the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such Act shall be valid as if provided under section 239 of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.

(3) ATTORNEY GENERAL OPTION TO TERMINATE AND REINSTATE PROCEEDINGS. — In the case described in paragraph (1), the Attorney General may elect to terminate proceedings in which there has not been a final administrative decision and to reinstate proceedings under chapter 4 of title II of the Immigration and Nationality Act (as amended by this subtitle). Any determination in the terminated proceeding shall not be binding in the reinitiated proceeding.

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW. — In the case described in paragraph (1) in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary —

(A) in the case of judicial review of a final order of exclusion, subsection (b) of such section shall not apply and the action for judicial review shall be governed by the provisions of subsections (a) and (c) of such in the same manner as they apply to judicial review of orders of deportation;

(B) a court may not order the taking of additional evidence under section 2347(c) of title 28, Unites States Code;

(C) the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation;

(D) the petition for review shall be filed with the court of appeals for the judicial circuit in which the administrative proceedings before the special inquiry officer or immigration judge were completed;

(E) there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act);

(F) service of the petition for review shall not stay the deportation of an alien pending the court's decision on the petition, unless the court orders otherwise; and

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section

212(a)(2) or sections 241(a)(2)(A)(iii),(B),(C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offense are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

(5) TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION. — Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

(6) TRANSITION FOR CERTAIN FAMILY UNITY ALIENS. — The Attorney General may waive the application of section 212(a)(9) of the Immigration and Nationality Act, as inserted by section 301(b)(1) of this division, in the case of an alien who is provided benefits under the provisions of section 301 of the Immigration Act of 1990 (relating to family unity).

(7) LIMITATION ON SUSPENSION OF DEPORTATION. — The Attorney General may not suspend the deportation and adjust the status under section 244 of the Immigration and Nationality Act of more than 4,000 aliens in any fiscal year (beginning after the date of the enactment of this Act). The previous sentence shall apply regardless of when an alien applied for such suspension and adjustment.

(d) TRANSITIONAL REFERENCES. — For purposes of carrying out the Immigration and Nationality Act, as amended by this subtitle —

(1) any reference in section 212(a)(1)(A) of such Act to the term "inadmissible" is deemed to include a reference to the term "excludable", and

(2) any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation.

(e) TRANSITION. — No period of time before the date of the enactment of this Act shall be included in the period of 1 year described in section 212(a)(6)(B)(i) of the Immigration and Nationality Act (as amended by section 301(c) of this division).

APPENDIX J — RENEWED PETITION FOR WRIT OF HABEAS CORPUS DATED NOVEMBER 24, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-3197-CIV LENARD

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner,

v.

JANET RENO, as Attorney General of the United States, and the IMMIGRATION AND NATURALIZATION SERVICE

Respondents.

RENEWED PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Ernesto Alonso Mejia Rodriguez, petitions this Court to issue its writ of habeas corpus pursuant to 28 U.S.C. § 2241. Mr. Mejia is currently in the custody of the respondents, Attorney General and Immigration and Naturalization Service, pursuant to an unlawful order of deportation entered by the Office of the Immigration Judge ("Immigration Judge") on August 2, 1991, and affirmed by the Board of Immigration Appeals on January 12, 1994. The order is unlawful because Mr. Mejia was denied the right to seek a suspension of deportation based solely upon a conviction in Florida Circuit Court, which conviction has been vacated by the Circuit Court, with all charges having

been abandoned in the case. Mr. Mejia is subject to imminent deportation by the Immigration and Naturalization Service ("INS"). The Board of Immigration Appeals ("Board") and the INS District Director, Miami, ("District Director") have denied Mr. Mejia's applications for a stay of deportation. This petition is accompanied by a Renewed Emergency Motion For Stay Of Deportation.

STATEMENT OF FACTS

1. Mr. Mejia is a native and citizen of Honduras. He was admitted into the United States as a non-immigrant visitor for pleasure on November 7, 1980.

2. On July 24, 1986, Mr. Mejia entered a no contest plea in the Circuit Court of the Eleventh Judicial Circuit of Florida in Dade County, Florida, to a charge of trafficking in cocaine, and was sentenced to one year of incarceration as a youthful offender, to be followed by two years of community control.

3. On March 8, 1990, Mr. Mejia was served with an Order To Show Cause. Exhibit 1.[1] The Order To Show Cause alleged that Mr. Mejia had entered the United States without inspection and had been convicted of a violation of law relating to a controlled substance. *Id.*

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1. Exhibits 1-8 are incorporated by reference to the same-numbered exhibits in Petitioner's original Petition For Writ Of Habeas Corpus, filed Sept. 26, 1997, D.E. #1.

4. On December 6, 1990, counsel for the INS amended the charges against Mr. Mejia, abandoning the allegation of illegal entry and adding an allegation that, "after admission as a nonimmigrant . . . you have remained in the United States for a longer time than permitted." Exhibit 2.

5. Mr. Mejia applied for suspension of deportation. The INS sought to pretermit the application for suspension based on Mr. Mejia's conviction in Dade County Circuit Court for the offense of trafficking in cocaine. *See* Exhibit 3.

6. The Immigration Judge, on August 2, 1991, overruled Mr. Mejia's objection that the state court's order did not constitute a conviction. *Id.*. The Immigration Judge expressly relied upon the conviction to find that Mr. Mejia "is not a person of good moral character" and, accordingly, that he was "not entitled to relief under suspension of deportation." *Id.* Mr. Mejia was ordered to be deported to Honduras. *Id.*

7. The Board, on January 12, 1994, dismissed Mr. Mejia's appeal and upheld the denial of his application for suspension. Exhibit 3.

8. Mr. Mejia thereafter applied to the Dade County Circuit Court for a writ of error *coram nobis*. On August 1, 1997, the Dade County Circuit Court granted the petition, ruling that the "orders withholding adjudication, imposing one year of youthful offender incarceration and two years of community control, entered in this cause on July 24, 1986, are hereby vacated, set aside, and held for naught." Exhibit 4.

9. Upon the entry of the Circuit Court's order, the State Attorney announced a *nolle prosequi* of all charges against

Mr. Mejia. Exhibit 5. On August 18, 1997, the Circuit Court entered an order recognizing that "the state has announced a *nolle prosequi* of all charges in this case," and further ordered that Mejia's criminal history record be scaled. Exhibit 5.

10. Mr. Mejia was taken into custody by the INS on September 23, 1997. On September 24, 1997, the District Director, received Mr. Mejia's Application For Stay Of Deportation. Exhibit 6. On September 26, 1997, Mr. Mejia attempted to file with the Immigration Judge the Respondent's Motion To Sua Sponte Reopen Deportation Proceedings And For Stay Of Deportation. Exhibit 7. The clerk refused to accept the motion for filing, stating that Mr. Mejia's case was under the exclusive jurisdiction of the Board.

11. On September 26, 1997, Mr. Mejia served and delivered to the Board by overnight mail Respondent's Emergency Motion To Sua Sponte Reopen Deportation Proceedings And For Stay Of Deportation. Exhibit 8.

12. On October 7, 1997, the Board denied Mr. Mejia's application for stay of deportation. Exhibit 9.[2]

13. By Order filed November 14, 1997, this Court ruled that Mr. Mejia's original Petition For Writ Of Habeas Corpus was premature based on the absence of a ruling from the District Director. The Court then ordered the Petition dismissed without prejudice. Exhibit 10.

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2. Exhibit 9 is incorporated by reference to Notice of Filing, October 15, 1997, D.E. #14.

Appendix J

14. Late on the afternoon of Friday, November 21, 1997, Mr. Mejia filed with the Clerk of Court two Motions: Motion For Reconsideration Of Petition For Writ Of Habeas Corpus and Petitioner's Motion For Emergency Hearing.

15. On the same date and at the same time that the above-mentioned Motions were being filed, Mr. Mejia's counsel were advised that INS had denied Mr. Mejia's application for stay of deportation. Counsel further advised that INS will issue a written order memorializing the denial on Monday, November 24, 1997. *See* Exhibit 11. A copy of the order will be filed with the Court immediately upon its receipt by counsel.

GROUNDS FOR RELIEF

16. The following grounds for relief are raised:

a. Mr. Mejia seeks a writ of habeas corpus and a stay of deportation because the basis for the pretermitting of his application for suspension of deportation was an unlawfully obtained state court conviction that has been vacated and set aside, with all charges abandoned by the state prosecutor. His detention by the respondents, without an opportunity to have his application for suspension of deportation considered on the merits, is accordingly in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

b. The conviction that subjected Mr. Mejia to the initial Order To Show Cause and upon which the Immigration Judge and the Board refused to consider Mr. Mejia's application

for suspension of deportation was obtained in violation of Mr. Mejia's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. The conviction accordingly has been vacated by the Florida Circuit Court. The collateral effect of the unconstitutionally obtained conviction is that Mr. Mejia was denied an opportunity to apply for suspension of deportation and is currently subject to deportation. His present custody is accordingly the product of a conviction obtained in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States.

c. The adverse rulings by the Immigration Judge and the Board were obtained in violation of Mr. Mejia's right to effective counsel, as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

d. The vacatur of Mr. Mejia's state conviction constitutes a new and material fact that he has a right to have considered by the Board and the Immigration Judge because the removal of the prior conviction revives the application for suspension of deportation that was pretermitted by the existence of the conviction. The unconstitutional impairment of Mr. Mejia's right to seek suspension violates the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

e. The use of Mr. Mejia's unconstitutionally obtained, and now-vacated, conviction to facilitate his removal from the United States constitutes a fundamental miscarriage of justice and is grave constitutional error that must be redressed through the issuance of a writ of habeas corpus.

Appendix J

CONCLUSION

Based upon the foregoing, and the reasons and authorities set forth in his concurrently filed Renewed Motion For Stay Of Deportation; And Renewed Motion For Release On Bail, Mr. Mejia requests the Court to: (1) order an immediate stay of deportation or removal of Mr. Mejia from the United States; (2) order his release from detention under such terms and conditions as are deemed appropriate; (3) grant him leave to amend and supplement this habeas petition; (4) after appropriate proceedings and briefing, to grant this petition and to order the Defendants to accord Mr. Mejia a hearing on his application for suspension of deportation; and (5) grant such other and further relief as shall be deemed appropriate.

Respectfully submitted,

Oscar Levin, Esq.
Florida Bar No. 262994
Elliot H. Scherker, Esq.
Florida Bar No. 202304
Robert Fernandez, Esq.
Florida Bar No. 091080
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

Counsel for Petitioner

By: s/ Elliot H. Scherker
Elliot H. Scherker

APPENDIX K — PETITIONER'S REPLY TO RESPONSE AND OPPOSITION TO RENEWED EMERGENCY MOTION FOR STAY DATED DECEMBER 23, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-3108-CIV-LENARD
Magistrate Judge Johnson

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner,

v.

JANET RENO, as Attorney General of the United States, and the IMMIGRATION AND NATURALIZATION SERVICE

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' RESPONSE AND OPPOSITION TO RENEWED EMERGENCY MOTION FOR STAY OF DEPORTATION OR REMOVAL AND RENEWED MOTION FOR RELEASE ON BAIL, AND REQUEST FOR EMERGENCY HEARING

Petitioner, Ernesto Alonso Mejia Rodriguez, files his reply to Respondents' Response and Opposition to Renewed Emergency Motion for Stay of Deportation or Removal and Renewed Motion for Release on Bail, and Request for Emergency Hearing (Response).

Appendix K

1. Respondents initially argue that Mr. Mejia should not be granted a stay of deportation because he is not likely to prevail on the merits of the habeas corpus petition. Response at 2. Respondents argue that the unconstitutionality of Mr. Mejia's state-court conviction notwithstanding, "his conviction for trafficking in cocaine still existed" in 1991, "at the time of his deportation hearing." *Id.* at 2. Thus, respondents reason that "no violation of due process occurred" because "[n]either the immigration judge or BIA could know that years later, [Mr. Mejia] would be able to have his conviction set aside." *Id.*

2. Respondents completely misstate Mr. Mejia's claim. Mr. Mejia was denied consideration of his application for suspension of deportation because of an unconstitutionally-obtained state criminal conviction, which conviction has now been vacated by the Florida courts, with all charges against Mr. Mejia abandoned. The vacatur of a state conviction upon which the INS has relied in a deportation proceeding satisfies the standard for securing a reopening of proceedings before the Immigration Judge or the BIA. *See, e.g., DeFaria v. INS,* 13 F.3d 422, 423 (1st Cir. 1993). Additionally, Mr. Mejia claims that the denial of effective assistance of counsel, arising from his prior counsel's failure to secure a vacatur of the state conviction during the pendency of the original deportation proceedings and the meritless arguments raised by his counsel in those proceedings, establish an independent claim for relief in federal habeas corpus. *See, e.g., Rabiu v. INS,* 41 F.3d 879, 882-83 (2d Cir. 1994).

3. Respondents further argue that Mr. Mejia "will not suffer irreparable harm" if he is deported, citing *Ignacio v.*

INS, 955 F.2d 295 (5th Cir. 1992). Response at 3. The *Ignacio* decision hardly holds that an alien facing imminent deportation cannot, as a matter of law, show "irreparable" harm; rather, the court in that case merely held that a petitioner with an insubstantial claim for relief in federal court, *i.e.*, a claim that was not likely to be granted, could not show irreparable harm from a denial of a stay. 955 F.2d at 299. On the other hand, as Judge King has ruled:

> There are constitutionally-protected liberty interests at stake when an alien is threatened with deportation and liberty and property interests where the right to seek suspension is removed. *Persons who are so threatened must have the opportunity under the framework of our laws to raise their constitutional claims.*

Tefel v. Reno, 972 F.Supp. 608, 616 (S.D. Fla. 1997) (emphasis supplied). "The federal courts cannot fulfill [their] responsibilities if aliens are deported before the courts can hear aliens' non-frivolous constitutional challenges." *Castro-Carvach v. INS*, 911 F.Supp. 843, 854-55 (E.D. Pa. 1995).

4. Respondents next offer the extraordinary argument that the "balance of hardships" favors the INS because "suspending the execution of a deportation order detrimentally impacts the INS by causing it to engage in another round of litigation, and incur the costs of further detention." Response at 3-4. In other words, respondents would have the Court rule that a stay of deportation should *never* be granted — the merits of the case notwithstanding — because the INS should not be forced by a federal court

to defend the constitutionality of its actions. This is akin to an argument that the federal courts have no authority over the INS, an argument that this District soundly has rejected, *Tefel v. Reno,* 972 F.Supp. at 616, and, in the context of an alien who raises constitutional claims in a habeas corpus petition, by every federal court to have considered the issue. See Renewed Emergency Motion for Stay of Deportation or Removal and Renewed Motion for Release on Bail at 6-9. The same answer pertains to respondents' "public interest" argument. See Response at 4-5.

5. Responding to Mr. Mejia's request for release on bail and for a hearing on that request, respondents continue simultaneously to assert (1) that Mr. Mejia is "a flight risk," and (2) that he should be denied a hearing at which the respondents and Mr. Mejia's counsel can present the facts to the court. Response at 5-6. The respondents' assertion that Mr. Mejia is a "flight risk" has yet to be tested by any sort of adversarial process.

6. In reply to respondents' reliance on Mr. Mejia's non-appearance in response to the INS's "bag and baggage" letter, however, it should not escape notice that Mr. Mejia's alleged incentive to flee did not cause him to secrete himself or to conceal his whereabouts after the 1995 issuance of the "bag and baggage" letter. To the precise contrary, Mr. Mejia remained within the mainstream of American life, gainfully employed and fulfilling all obligations of a resident of this country, until his arrest on September 23, 1997. Indeed, Mr. Mejia was taken into custody by the INS at his place of employment. While the government may ultimately be entitled to argue before the Court that Mr. Mejia's

non-appearance is evidence that should be considered in determining whether to grant bond and the amount of any bond set by the court, the government should *not* be entitled simultaneously to resist a hearing on Mr. Mejia's motion because "[t]he record provides ample support for the INS's decision to deny bond." Response at 6.

7. As of the date of the filing of this reply, Mr. Mejia has been in custody for exactly three months. He entreats the Court to grant him a hearing on his pending motions.

Respectfully submitted,

Oscar Levin, Esq.
Florida Bar No. 262994
Elliot H. Scherker, Esq.
Florida Bar No. 202304
Robert H. Fernandez
Florida Bar No. 091080
Greenberg Traurig Hoffman
Lipoff Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

Counsel for Petitioner

By: s/ Elliot H. Scherker
Elliot H. Scherker

APPENDIX L — PETITIONER'S MOTION FOR REHEARING OF JANUARY 4, 1999 ORDER DATED FEBRUARY 1, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 98-04426

U.S.D.C. NO. 97-3108-CIV-LENARD (S.D. FLA.)

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner-Appellant,

vs.

JANET RENO, as Attorney General of the United States, and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents-Appellees.

PETITION OF PETITIONER-APPELLANT ERNESTO ALSONO MEJIA RODRIGUEZ FOR REHEARING

Elliot H. Scherker, Esq.
Florida Bar No. 202304
Oscar Levin, Esq.
Florida Bar No. 262994
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0723

Counsel for Ernesto Alonso Mejia Rodriguez

* * *

Appendix L

PETITION OF PETITIONER-APPELLANT ERNESTO ALSONO MEJIA RODRIGUEZ FOR REHEARING

The petitioner-appellant, Ernesto Alonso Mejia Rodriguez, requests this Court to grant rehearing of its decision issued in this cause on January 4, 1999. The Court held that it has jurisdiction to hear Mr. Mejia's petition for review of the order of the Board of Immigration Appeals denying his motion to reopen. On January 25, 1999, however, the Court issued an order in the review proceeding directing Mr. Mejia to address its jurisdiction to hear the petition for review. Because the Court's decision in this cause — and, specifically, its declination to address the availability of habeas corpus — turned on the jurisdictional availability of review on Mr. Mejia's petition for review, Mr. Mejia requests the Court to grant rehearing in this cause.

1. On January 4, 1999, this Court issued its decision on Mr. Mejia's appeal of the district court's final judgment denying his 28 U.S.C. § 2241 habeas corpus petition. This petition for rehearing is timely under Rule 40(a) of the Federal Rules of Appellate Procedure and Eleventh Circuit Rule 40-2, as having been filed within 45 days of the decision in a case in which an officer of the United States is a party.

2. The Court held that a repeal of Section 2241 jurisdiction over Mr. Mejia's habeas corpus petition is not unconstitutional because Mr. Mejia has access to this Court on a petition for review of the BIA's order. *Mejia Rodriguez v. Reno*, Case No. 98-4426 (11th Cir. Jan. 4, 1999) (copy attached as Appendix 1). The Court held that the repeal of Section 2241 is not unconstitutional as to Mr. Mejia because of the availability of this judicial review.

3. As noted in the decision, Mr. Mejia filed his petition for review during the pendency of this appeal, upon the BIA's issuance of its order on November 27, 1998, denying his motion to reopen.

4. On January 25, 1999, following the issuance of this Court's decision in this cause, the Clerk of the Court issued a Memorandum to Counsel or Parties in *Mejia Rodriguez v. INS*, Case No. 98-5878, the petition for review proceeding. A copy of the Memorandum is attached as Appendix 2. The Memorandum states that, "[a]fter review of the district court docket entries, order and/or judgment appealed from, and the notice of appeal, it appears that this court may lack jurisdiction over this appeal." *Id.* The attached "Jurisdictional Question" is: "Whether the Board of Immigration Appeals' November 27, 1998, order denying petitioner's motion to reopen his deportation proceeding is reviewable?" *Id.*

5. Mr. Mejia has filed a response to the jurisdictional question in Case No. 98-5878.

6. The linchpin of the Court's analysis in this case, however, is the availability of judicial review through the petition for review. While the Court expressed "no opinion on any procedural or substantive hurdles that Mejia's current petition for review may face," and declined to "decide the parameters of the issues to be decided in ruling on Mejia's petition for review," the Court recognized the existence of jurisdiction in this Court over the BIA's order denying Mr. Mejia's motion to reopen. The continued viability of that premise, however, has been placed into doubt by the Court's order in the review proceeding.

7. Mr. Mejia accordingly requests the Court to grant rehearing in this cause and to withhold issuance of a final decision pending the disposition of the proceeding in Case No. 98-5878. Should Mr. Mejia be denied *any* opportunity to present his claims in Case No. 98-5878, it will become necessary for the Court to address the constitutional issues that will thereby be presented.

WHEREFORE, Mr. Mejia requests this Court to grant rehearing in this cause.

Respectfully submitted,

Elliot H. Scherker, Esq.
Florida Bar No. 202304
Oscar Levin, Esq.
Florida Bar No. 262994
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0723
Counsel for Ernesto Alonso Mejia Rodriguez

By: s/ Elliot H. Scherker
Elliot H. Scherker

Appendix L

APPENDIX 1

[Omitted — See Appendix C]

Appendix L

APPENDIX 2

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

January 25, 1999

MEMORANDUM TO COUNSEL OR PARTIES

RE: 98-5878 Mejia-Rodriguez v. Reno
AGCY NO.: A29-362 615

NOTICE OF APPEAL FILED: December 14, 1998

The referenced case has been docketed. After review of the district court docket entries, order and/or judgment appealed from, and the notice of appeal, it appears that this court may lack jurisdiction over this appeal. If it is determined that this court is without jurisdiction, this appeal will be dismissed.

The parties are requested to simultaneously advise the court in writing within fourteen (14) days from the date of this letter of their position regarding the jurisdictional question(s) set forth on the attached page. An original plus three copies of any response should be filed. The responses must include a Certificate of Interested Persons and Corporate Disclosure Statement as described in Fed.R.App.P. 26.1 and the

corresponding circuit rules. Requests for extensions of time to file a response may not be entertained. Please do not address any other issues on appeal at this time.

After fourteen (14) days, this court will consider any response(s) received and any portion of the record that may be required to resolve the jurisdictional issue(s). If a transcript has been ordered [*See* Fed.R.App.P. 10(b)], it is appellant's responsibility to make arrangements with the court reporter to postpone the preparation of the transcript pending a determination of the jurisdictional issues, if this is desired. The parties will be advised by this office of the court's determination and of any further actions which may be required.

Counsel participating in this appeal should complete and return the enclosed appearance form within fourteen (14) days [11th Cir. R. 46-1]. Only counsel who enter an appearance will be noted on the docket. Persons appearing pro se need not file an appearance form.

Sincerely,

s/ Thomas K. Kahn
THOMAS K. KAHN, Clerk
Reply To: Vicki Berrong
(404) 335-6188

Encl.

Appendix L

NO. 98-5878

JURISDICTIONAL QUESTION(S)

Whether the Board of Immigration Appeals' November 27, 1998, order denying petitioner's motion to reopen his deportation proceeding is reviewable? *See Rodriguez v. Reno*, No. 98-4426 (11th Cir. Jan. 4, 1999); *Richardson v. Reno*, No. 98-4230 (11th Cir. Dec. 22, 1998).

APPENDIX M — PETITION FOR REHEARING AND REHEARING *EN BANC* DATED AUGUST 5, 1999

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 98-4426

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner-Appellant,

v.

JANET RENO, as Attorney General of the United States, and the Immigration and Naturalization Service,

Respondent-Appellees.

Case No. 98-5878

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA AND ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

Appendix M

PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

ELLIOT H. SCHERKER, ESQ.
OSCAR LEVIN, ESQ.
BRENDA K. SUPPLE, ESQ.
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

Attorneys for Petitioner/Petitioner-Appellant

* * *

Appendix M

STATEMENTS OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999); *Haitian Refuge Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves questions of exceptional importance: (1) whether habeas corpus is available to review claims of constitutional deprivation by aliens who are subject to deportation; and (2) whether a denial of due process of law that renders an alien ineligible to seek discretionary relief from deportation is cognizable as a constitutional claim under the Due Process Clause of the Fifth Amendment.

s/ Elliot H. Scherker
Elliot H. Scherker
Attorney for Petitioner-Appellant
Ernesto Alonso Mejia Rodriguez

* * *

Appendix M

STATEMENT OF THE ISSUES

(1) Whether habeas corpus is available to redress constitutional claims following the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

(2) Whether a denial of due process of law that renders an alien ineligible to seek discretionary relief from deportation states a cognizable claim of constitutional deprivation under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Mr. Mejia instituted a habeas corpus proceeding before the district court in September 1997, challenging the constitutionality of a deportation order issued by the Immigration and Naturalization Service (INS) because his application for a suspension of deportation under former Section 244 of the Immigration and Nationality Act (INA) had been pretermitted by the immigration judge based solely on an unconstitutionally-obtained conviction. Appendix (hereinafter "A") at 9. The conviction upon which the immigration judge relied to pretermit Mr. Mejia's application for suspension of deportation was vacated by the Florida state court in August 1997 because Mr. Mejia had been denied effective assistance of counsel in the state plea proceedings, in which proceedings he had been advised by his counsel that the state court's order withholding adjudication would have no effect on his immigration status. (A:3, 7).

Appendix M

The district court entered its final order denying Mr. Mejia's habeas corpus petition on March 12, 1998, and Mr. Mejia sought timely appellate review before this Court. (A:10-11). During the pendency of Mr. Mejia's appeal, the BIA denied Mr. Mejia's motion to reopen in an order dated November 27, 1998. (A:8). Mr. Mejia filed a timely petition for review. (A:8-9).

The panel issued its initial decision affirming the order denying Mr. Mejia's habeas corpus petition on January 4, 1999. *Mejia Rodriguez v. Reno*, 164 F.3d 575 (11th Cir.), *vacated*, 168 F.3d 1305 (11th Cir.), *superseded*, 178 F.3d 1139 (11th Cir. 1999). While Mr. Mejia's petition for rehearing was pending, the panel *sua sponte* vacated the January 4, 1999 opinion. *Mejia Rodriguez v. Reno*, 168 F.3d 1305 (11th Cir. 1999). On June 22, 1999, the panel issued its decision affirming the BIA's order denying Mr. Mejia's motion to reopen, and dismissing as moot the appeal from the order denying Mr. Mejia's habeas petition. *Mejia Rodriguez v. Reno*, 178 F.3d 1139 (11th Cir. 1999).

STATEMENT OF THE FACTS

Mr. Mejia, a native of Honduras, lawfully entered the United States at the age of 15 years as a nonimmigrant visitor on November 17, 1980. (A:2; R2:16:163). In 1986, Mr. Mejia entered a negotiated no-contest plea to a charge of trafficking in cocaine, in reliance on representations by his counsel "that his no-contest plea would not yield any adverse immigration consequences." (A:3). Mr. Mejia was sentenced to a one-year term of youthful-offender incarceration and a two-year probationary term. *Id.*

Appendix M

After Mr. Mejia's release from incarceration, the INS granted his request for lawful status in the United States as a nonimmigrant student through August of 1990. (R2:16:148). On March 8, 1990, however, the INS commenced deportation proceedings against Mr. Mejia, issuing an order to show cause that charged Mr. Mejia with deportability for allegedly having entered the United States without inspection and also based upon the state conviction. (A:4). Following a hearing before the immigration judge in September 1990, at which hearing the judge was advised that Mr. Mejia in fact lawfully had entered the United States (R2:16:55-56), the INS abandoned the original deportation charges and sought Mr. Mejia's deportation solely on the ground that his student visa, which had been valid through August 1990, had expired during the deportation proceedings. (A:4).

On January 24, 1991, the immigration judge entered a deportation order but granted Mr. Mejia leave to seek a suspension of deportation under former INA § 244, 8 U.S.C. § 1254(a)(2) (1991). The INS then moved to pretermit Mr. Mejia's application for suspension based on the conviction. (A:5). The immigration judge, rejecting the arguments of Mr. Mejia's counsel that the order withholding adjudication did not constitute a "conviction" (R2:16:112-18), pretermitted Mr. Mejia's application for suspension of deportation. (A:6). The BIA upheld the deportation order on January 12, 1994. (A:6-7). Mr. Mejia was thereafter ordered to appear for deportation on May 12, 1995, but did not do so. (A:7).

In August 1997, the Florida circuit court granted Mr. Mejia's *coram nobis* petition and vacated the conviction upon

a holding that Mr. Mejia had been denied effective assistance of counsel in the state criminal proceedings by the misadvice of his counsel concerning the consequences of the conviction on his immigration status. (A:7-8). The Florida prosecutor abandoned the state charges. (A:8).

The INS took Mr. Mejia into custody to execute the deportation order on September 23 1997. (A:8). Mr. Mejia simultaneously filed his initial habeas corpus petition in the district court and moved to reopen the deportation proceedings before the BIA. (A:8-9). Mr. Mejia's petition asserted claims of ineffective assistance of counsel under the Sixth Amendment (arising from the denial of effective assistance in the state plea proceedings) and the Fifth Amendment (arising from the immigration proceedings), as well as a due process claim based on the use of an unconstitutionally-obtained conviction to pretermit his suspension application. (A:9; R3:26). The district court dismissed Mr. Mejia's petition on March 12, 1998. (A:10-18).

During the pendency of Mr. Mejia's appeal, the BIA issued its November 27, 1998 order, denying Mr. Mejia's motion to reopen the deportation proceedings because the motion had not been filed within 90 days of the BIA's decision upholding the deportation order or before September 30, 1996, as required by 8 C.F.R. § 3.2(c)(2). (A:8). Mr. Mejia timely filed his petition for review of the BIA's order. (A:8-9).

In its initial decision on appeal, the panel held that the district court lacked jurisdiction over Mr. Mejia's petition

because Section 242(g) of the INA, as enacted in 1996 in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), had abolished habeas corpus in immigration cases. *Mejia Rodriguez*, 164 F.3d at 580. Following the advent of *Reno v. American-Arab Anti-Discrimination Committee*, __ U.S. __, 119 S. Ct. 936 (1999), the panel vacated its initial decision. *Mejia Rodriguez v. Reno*, 168 F.3d 1305 (11th Cir. 1999).

The panel's second decision, issued on June 22, 1999, addresses only Mr. Mejia's petition for review of the BIA's order denying his motion to reopen. (A:11-13). Acknowledging that Mr. Mejia has sought to raise, through habeas corpus, a claim that the Sixth Amendment deprivation in the state-court proceedings unconstitutionally tainted the deportation proceedings by subjecting him to having his suspension application pretermitted based on an unconstitutional conviction, the panel declined to address the Sixth Amendment claim because the BIA had dismissed Mr. Mejia's motion to reopen as untimely:

> Mejia argues that he continues to suffer the consequence of the ineffective assistance of counsel that he received in his state criminal proceeding because his unconstitutional conviction has rendered him ineligible for suspension of deportation. According to Mejia, his ineligibility for suspension represents a continuing violation of the Sixth Amendment right to the effective assistance of counsel . . . .
>
> * * *

> . . . [E]ven assuming that Mejia suffered a constitutional violation in his deportation proceedings, the application of the limitations period from 8 C.F.R. § 3.2(c)(2) does not raise constitutional concerns merely because it leaves Mejia without a remedy for vindicating his assumed constitutional injury.

(A:13-15).[1]

The court next rejected Mr. Mejia's separate Fifth Amendment claim. (A:15-16). Because " 'suspension of deportation' is an 'act of grace' committed to the 'unfettered discretion' of the Attorney General," the court held that a denial of effective assistance of counsel in deportation proceedings, which denial pretermits an application for suspension of deportation, does not state a claim for deprivation of due process:

> [A]n attorney's deficient representation does not deprive an alien of due process if the deficient representation merely prevents the alien from being eligible for suspension of deportation. An alien's actual chances of receiving such discretionary relief are too speculative and too far beyond the capability of judicial review, to

1. In its later decision in *Richardson v. Reno*, __ F.3d __, Case No. 98-4230 (11th Cir. July 14, 1999), the same panel reaffirmed its prior holding in *Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998), *cert. granted and judgment vacated*, __ U.S. __, 119 S. Ct. 2016 (1999). A petition for rehearing and rehearing *en banc* is presently pending in the *Richardson v. Reno* appeal.

> conclude that the alien has actually suffered prejudice from being ineligible for suspension of deportation . . . .

(A:20-22) (citations and footnote omitted).[2] The panel held that, "assuming Mejia's representation during his initial deportation proceedings was deficient, this deficient representation did not deprive Mejia of . . . due process." (A:22-23).

ARGUMENT

I. The Availability of Habeas Corpus After IIRIRA.

In *Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998), *cert. granted and judgment vacated*, __ U.S. __, 119 S. Ct. 2016 (1999), the panel of this Court that decided Mr. Mejia's appeal parted company with every other Circuit that has addressed the viability of habeas corpus following the 1996 enactment of IIRIRA. The panel held that INA § 242(g) "expressly repeals any and all jurisdiction except that conferred by INA § 242," including habeas corpus jurisdiction. 162 F.3d 1358-59.

Both prior to and following *Richardson*, every other Circuit expressly to have considered this issue has ruled expressly to the contrary, holding that Section 2241 habeas

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2. On July 14, 1999, the same panel issued its decision in *Tefel v. Reno*, __ F.3d __, Case No. 98-4616 (11th Cir. 1999), replicating the analysis set forth in the text to hold that no due process violation arises from the INS's decision to declare a class of aliens ineligible to seek suspension of deportation.

corpus survives the enactment of IIRIRA. *E.g. Shah v. Reno*, __ F.3d __, 1999 WL 493681 (8th Cir. July 1, 1999); *Mustata v. U.S. Department of Justice*, __ F.3d __, 1999 WL 393652 (6th Cir. June 17, 1999); *Sandoval v. Reno*, 166 F.3d 225, 236-38 (3d Cir. 1999); *Henderson v. INS*, 157 F.3d 106, 117-22 (2d Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1141 (1999); *Goncalves v. Reno*, 144 F.3d 110, 122 (1st Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1140 (1999); *Ler de Garcia v. INS*, 141 F.3d 215, 217 (5th Cir. 1998); *Ramallo v. Reno*, 114 F.3d 1210, 1214 (D.C. Cir. 1997), *cert. denied*, __ U.S. __, 119 S. Ct. 1139 (1999).[3] In the face of this precedent, however, the panel reinstated its holding in *Richardson* on remand from the United States Supreme Court. *Richardson v. Reno*, __ F.3d __, 1999 WL 496241 (11th Cir. July 14, 1999). The panel held that "IIRIRA precludes § 2241 habeas jurisdiction over an alien's petition challenging his removal proceedings," stating, "we reaffirm and reinstate our opinion in *Richardson I* except for the aspects of the opinion that relied on INA § 242(g)." *Id.* at 4, 6.

Prior to *Richardson II*, this Court decided *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999).[4] In *Mayers*, this Court

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3. The Seventh Circuit appears to endorse a form of direct review, although intimating that, "if for reasons beyond the alien's control he could not have raised his substantial constitutional issue in this court by seeking review here directly . . . he may be able to proceed in the district court under 28 U.S.C. § 2241." *LaGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998).

4. The inconsistency in the precedents of this Court is undeniable. Using the WESTLAW KeyCite© service to ascertain the subsequent history of *Mayers* reveals that *Mayers* is deemed to have been "superseded by statute as stated in" *Richardson II*.

rejected the government's argument that AEDPA § 401(e) and IIRIRA had repealed Section 2241 habeas corpus, relying chiefly on the First Circuit's decision in *Goncalves v. Reno*. 175 F.3d at 1299-300. The Court held that habeas corpus remains available, at least for "transitional" aliens such as the petitioners in that case and Mr. Mejia. *Id.* at 1301.

The disharmony in the precedent is brought into sharp focus by the panel's refusal to address Mr. Mejia's Sixth Amendment claim. That claim was not cognizable before the BIA on Mr. Mejia's motion to reopen. The BIA, while empowered to address "administratively correctable procedural errors, even when these errors are failures to follow due process," *Liu v. Waters*, 55 F.3d 421, 426 (9th Cir. 1995), does not otherwise "have jurisdiction to adjudicate constitutional issues." *Vargas v. INS*, 831 F.2d 906, 908 (9th Cir. 1987); *accord, e.g., Singh v. Reno*, __ F.3d __, 1999 WL 335675 (7th Cir. 1999); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993). Mr. Mejia's *Sixth Amendment claim*, unlike his separate Fifth Amendment claim, does not arise from an "administratively correctable procedural error" in the immigration proceedings, but rather from the *state criminal proceedings* that resulted in his unconstitutional conviction. The Sixth Amendment claim calls upon the Court to rule on the consequences of the Sixth Amendment violation — a quintessentially *judicial* function. *See e.g., Van Zant v. Florida Parole Commission*, 104 F.3d 325, 327 (11th Cir. 1997).[5]

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5. Interestingly, the government has *never* contended that Mr. Mejia's Sixth Amendment claim could have been raised before, and passed upon by, the BIA. That suggestion appears, for the first time, in the panel's decision.

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The panel's refusal to hear Mr. Mejia's Sixth Amendment claim on habeas corpus thus deprives Mr. Mejia of *all judicial review* of that constitutional claim. Barred by established precedent and the limitations of administrative review from presenting a Sixth Amendment claim that arises from another sovereign's judicial proceedings to the BIA, Mr. Mejia has unaccountably been denied *any* access to the courts to present his Sixth Amendment claim.[6]

The Sixth Amendment violation in the state courts — the existence of which is established beyond dispute by the state court's unchallenged ruling thereon — is at the very heart of Mr. Mejia's constitutional claims. The denial of effective assistance in the state court proceedings led directly to Mr. Mejia's unconstitutional conviction, which conviction provided the basis for pretermitting his suspension application. Mr. Mejia has thus been denied *any* judicial review of the discrete constitutional violation from which flows the injury for which he seeks redress before the federal courts. As in *Mayers*, habeas corpus must be available for claims that "affect the aliens' substantial rights," particularly where, as here, the petitioner challenges a final order of deportation and is otherwise "unable to obtain any judicial review." *Mayers*, 175 F.3d at 1301. The panel's decision is utterly irreconcilable with this precedent.

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6. The panel's treatment of the Sixth Amendment claim is truly anomalous. Although Mr. Mejia *did not* raise — and *could not* have raised — his Sixth Amendment claim before the BIA, the panel held that the BIA's refusal to consider Mr. Mejia's motion to reopen based on the untimeliness thereof should bar Mr. Mejia from pursuing his Sixth Amendment claim in the federal courts. (A:14-15).

II. The Quality of Due Process.

The central rationale of the panel's rejection of Mr. Mejia's Fifth Amendment claim is that *no such claim* may be brought to challenge ineffective assistance of counsel in seeking discretionary relief from deportation. (A:15-22). The panel declares that aliens have no cognizable "liberty interest" in obtaining suspension of deportation (or any other form of discretionary relief) and, accordingly, "being ineligible for suspension of deportation as a consequence of deficient representation" can *never* constitute a due process violation. (A:21-22). Reduced to its essence, the panel's ruling is that an individual who is wrongfully denied an opportunity to seek discretionary relief may *never* seek redress for that denial.

The panel recognized that its ruling in this regard is inconsistent with decisions of the Second and Fifth Circuits, both of which courts have recognized a claim of ineffective assistance under the Fifth Amendment for an attorney's failure to seek a waiver of deportation under former INA § 212(c), 8 U.S.C. § 1182(c) (1996). *Rabiu v. INS*, 41 F.3d 879, 882-83 (2d Cir. 1994); *Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994). (A:22 n.8).[7] The Third Circuit's

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7. Although the panel set forth its disagreement with these decisions, it also noted that "both *Rabiu* and *Miranda-Lores* involved waiver of deportation which, unlike suspension of deportation is available to only lawful permanent residents of the United States who have greater expectancy of remaining in the United States than aliens, like Mejia who are not lawful permanent residents." (A:22 n.8). No precedent is cited by the panel for the proposition that a nonimmigrant facing deportation is entitled to lesser due process

(Cont'd)

decision in *Green v. INS*, 46 F.3d 313, 317-20 (3d Cir. 1995), holds consistently with the *Rabiu* and *Miranda-Lores* decisions. While the panel opinion cites to precedent for the proposition that an alien does not necessarily have a "liberty interest" in *receiving* certain forms of discretionary relief that are within the INS's authority to extend as a matter of grace (A:18-20), the panel failed to recognize the established — and critical — distinction between an individual's due process right to *request* discretionary relief and the largely-unreviewable ultimate decision by the government whether to *grant* that relief.[8]

(Cont'd)

protections than a permanent resident facing deportation. It has been established since the era of *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), and *Wong Wing v. United States*, 163 U.S. 228, 238 (1896), that aliens within the United States are entitled to due process protection and that "[e]ven one whose presence in the country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (citations omitted); *accord, e.g., Plyler v. Doe*, 457 U.S. 202, 210 (1982). So it is that a nonimmigrant visitor, such as Mr. Mejia, "has a right to a full and fair deportation hearing that comports with due process. *Bauge v. INS*, 7 F.3d 1540, 1543 (10th Cir. 1993); *accord, e.g., Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) ("while there is no constitutional right to political asylum itself, non-citizens, even those charged with entering the country illegally are entitled to due process when threatened with deportation") (citations omitted). The courts are simply not empowered to parcel out due process to aliens depending on the status of a particular alien who is haled before the immigration authorities by the government.

8. Indeed, the constitutional linchpin of the panel's rationale *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981), itself recognizes the distinction. The claim in *Dumschat*, was that the pardon board had created a constitutional liberty interest

(Cont'd)

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In *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982), this Court extended procedural due process protections to an alien's "constitutionally protected right to petition our government for political asylum." *Id.* at 1038. The Court relied on the federal regulations promulgated by the Attorney General to find "a clear intent to grant aliens the right to submit and the opportunity to substantiate their claim for asylum." *Id.* (footnotes and citation omitted). But the court was careful to distinguish between the right to *seek* asylum and the ultimate relief sought by the alien:

> There is no constitutionally protected right to *political asylum* itself. Although fragile, the right to *petition* is nevertheless a valuable one to the possessor. By it he may at least send his message and be assured of the ear of the recipient. Whether this minimal entitlement be called a liberty or property interest, *we think it is sufficient to invoke the guaranty of due process*.

Id. at 1039 (footnotes omitted; emphasis supplied).[9]

(Cont'd)
in life inmates that required the board to explain its reasons for denying an application for commutation of a life sentence. *Id.* at 459. The Court rejected the claim because, as the panel opinion notes, no such liberty interest existed, *id.* at 460-66, and, in the penultimate paragraph of its decision, stated: "'We hold that the power vested in the Connecticut Board of Pardons to commute sentences conferred no rights on respondents *beyond the right to seek commutation*.'" *Id.* at 467 (emphasis supplied). The panel opinion fails to note this significant distinction in discussing *Dumschat*. (A:18-19).

9. The panel's decision in *Tefel v. Reno*, __ F.3d __, 1999 WL 496227 (11th Cir. July 14, 1999), issued approximately three weeks
(Cont'd)

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This Court's decision in *Mayers v. INS* also addresses the point, and quite clearly. The petitioners in *Mayers* had been denied waivers of deportation under former INA § 212(c) with the advent of AEDPA's abolition thereof. Relying on the Supreme Court's decision *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954), and *Goncalves v. Reno*, 144 F.3d at 125 ("the decision whether an alien is eligible to be considered for a particular discretionary form of relief is a statutory question separate from the discretionary component of the administrative decision whether to grant relief"), the Court rejected the precise rationale that the panel endorsed in this case:

> The government attempts to muddy the waters by arguing that petitioners cannot seek review of a discretionary decision by the BIA. To the contrary, *petitioners are not seeking to review a decision* to grant or deny a § 212(c) waiver, but rather are seeking to review a decision concerning *the ability to apply for such waiver*.

175 F.3d at 1300 n.15. The Court held that the petitioners' claims, arising from their inability to seek Section 212(c) relief, "affect the aliens' *substantial rights* and are of the nature that courts have enforced through judicial review even when Congress has attempted to limit the courts' jurisdiction

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(Cont'd)

after the opinion in Mr. Mejia's case, notes the *Smith* decision, but nonetheless holds that it is "a distinction without a constitutional difference" to suggest that there is a liberty or property interest in the opportunity to seek a suspension of deportation. *Id.* at *15-16. As set forth in *Smith* however, there is indeed such a distinction.

in immigration matters as far as constitutionally permitted." *Id.* at 1301 (emphasis supplied); *accord, e.g.*, *Shah v. Reno*, *supra*.

The decision in *Accardi*, upon which the Court relied in *Mayers*, arose from a refusal to grant suspension of deportation, which refusal purportedly was based on the petitioner's inclusion on a list of individuals whom the government wished to deport. 347 U.S. at 267. Cautioning that it was not "reviewing and reversing the manner in which discretion was exercised," the Court held that a grant of relief would allow the petitioner an opportunity to seek suspension, which opportunity would "afford[ ] that due process required by the regulations in such proceedings." *Id.* at 268.

The Supreme Court long has distinguished between the right to *seek* suspension and the ultimate relief:

> Eligibility for the relief here involved is governed by specific statutory standard which provides *a right to a ruling on an applicant's eligibility*. However, Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. *That determination* is left to the sound discretion of the Attorney General . . . .

Jay v. Boyd, 351 U.S. 345, 353 (1956) (emphasis supplied).

Just as the denial of eligibility for discretionary relief from deportation was held to constitute a substantial claim, cognizable on habeas corpus, in *Mayers*, the denial of

eligibility to seek suspension of deportation, deprived Mr. Mejia of a right vouchsafed by the then-applicable immigration statutes and regulations. The panel's holding that no Fifth Amendment due process implications attached to such a violation is irreconcilable with the Court's precedent.

CONCLUSION

Based on the foregoing, Mr. Mejia requests the Court to grant rehearing and/or rehearing *en banc* in this cause.

Respectfully submitted,

Elliot H. Scherker, Esq.
Florida Bar No. 202304
Oscar Levin, Esq.
Florida Bar No. 262994
Brenda K. Supple, Esq.
Florida Bar No. 124941
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0723

By: s/ Elliot H. Scherker
Elliot H. Scherker

Counsel for Ernesto Alonso Mejia Rodriguez

APPENDIX N — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DIRECTING RESPONDENT TO RESPOND TO PETITION FOR REHEARING DATED AND FILED FEBRUARY 8, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4426

D.C. Docket No. 97-3108-CIV-LENARD

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner-Appellant,

versus

JANET RENO, as Attorney General of the United States, and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

No. 98-5878

INS No. A29-362-615

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner,

versus

Appendix N

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review from the
Board of Immigration Appeals

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.*

HULL, Circuit Judge:

The Court hereby directs that the Respondent-Appellees Janet Reno, as Attorney General, and the INS in Case No. 989-4426 and Respondent INS in Case No. 98-5878 shall file a joint Brief in response to Petitioner-Appellant's Petition for Rehearing and Petition for Rehearing En Banc filed on August 5, 1999. This joint Brief shall not exceed twenty-five pages and shall be filed within fourteen days or on or before February 22, 2000.

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* This order is issued by a quorum due to Judge Henderson's death on May 11, 1999. *See* 28 U.S.C. § 46(d).

APPENDIX O — RESPONDENT'S OPPOSITION TO PETITION FOR REHEARING AND REHEARING *EN BANC* DATED FEBRUARY 21, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-4426

ERNESTO ALONSO MEJIA-RODRIGUEZ,

Petitioner/Appellant,

v.

JANET RENO, Attorney General of the United States, and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents/Appellees.

No. 98-5878

ERNESTO ALONSO MEJIA-RODRIGUEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Appendix O

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA AND PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS (CONSOLIDATED)

RESPONDENT'S OPPOSITION TO THE PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

THOMAS E. SCOTT
United States Attorney

DEXTER LEE,
Assistant United States Attorney
99 N.E. 4th Street
Miami, FL 33132

DAVID W. OGDEN
Acting Assistant Attorney General
Civil Division
DAVID V. BERNAL,
Assistant Director
Office of Immigration Litigation
LINDA S. WENDTLAND,
Senior Litigation Counsel
ERNESTO H. MOLINA, JR.,
Attorney
Office of Immigration Litigation
Civil Division
Department of Justice
P.O. Box 878,
Ben Franklin Station
Washington, D.C. 20044
(202) 616-9344
ATTORNEYS FOR RESPONDENTS/APPELLEES

* * *

Appendix O

INTRODUCTION

The Court should deny petitioner/appellant Ernesto Alonzo Mejia Rodriguez's ("Mejia") Petition for Rehearing and Petition for Rehearing En Banc ("rehearing petition"). The instant case does not meet the criteria for either panel rehearing or rehearing en banc because there is no intra-circuit conflict or misapprehension of any points of fact or law relating to the issues that the Court addressed. Fed. R. App. P. 35(a) & 40(a)(2).

More specifically, the instant case is not an appropriate vehicle for addressing the availability of review by way of habeas corpus for deportation proceedings, because the Court properly dismissed Mejia's habeas petition as moot, based on the full review of his final deportation order that the Court had afforded through his petition for review. Indeed, given that Mejia was afforded full review through such a petition, circuit precedent indicates that habeas corpus review is unavailable to him. *See Richardson v. Reno*, 180 F.3d 1311, 1316 n.6 (11th Cir. 1999) ("*Richardson II*"); *Mayers v. U.S. INS*, 175 F.3d 1289, 1301 n.17 (11th Cir. 1999). In any event, contrary to Mejia's arguments, the Court's *Richardson* and *Mayers* decisions can be harmonized and are not in conflict, given that they were decided under different statutory regimes.

On the merits, although Mejia argues that his attorney's ineffectiveness deprived him of a constitutionally protected "liberty interest" in the "right to apply" for discretionary suspension of deportation, the pertinent precedents have rejected his analysis. Actually, his argument is an effort to

collaterally attack his criminal conviction in deportation proceedings, which the precedents of this Court prohibit. Moreover, the Court correctly held that there can be no constitutionally protected "liberty interest" in obtaining purely discretionary relief, and authoritative precedents also reject Mejia's claim of a protected interest in the opportunity "to apply" for such relief. Further, there was no denial of an opportunity to apply for suspension. Mejia's attorney did apply for and actively pursued such relief; Mejia's current claims of ineffectiveness relate only to *substantive* eligibility for suspension, and not the "opportunity to apply" itself.

COURSE OF PROCEEDINGS

A. Mejia's Deportation Proceedings

Mejia is a native and citizen of Honduras who initially entered the United States in 1980 as a nonimmigrant visitor for pleasure. On July 24, 1986, Mejia was convicted in a Florida state court of trafficking in cocaine, on a plea of *nolo contendere*. On March 8, 1990, the INS commenced deportation proceedings against Mejia through the issuance of an Order to Show Cause ("OSC"), charging Mejia with deportability under sections 241(a)(2) and (11) of the Immigration and Nationality act of 1952, as amended ("INA"), 8 U.S.C. § 1251 (a) (2) and (11) (1987), as an alien who had entered the United States without inspection and as an alien convicted of a controlled substance violation. On December 6, 1990, the INS amended its OSC by withdrawing the above-mentioned charges and instead charging Mejia with deportability under section 241(a)(2) of the INA for having overstayed his nonimmigrant visa.

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On August 2, 1991, an immigration judge found Mejia deportable as charged. The immigration judge also denied Mejia's request for relief from deportation in the form of suspension of deportation under section 244(a) of the INA, 8 U.S.C. § 1254(a), concluding that Mejia's drug conviction precluded him from satisfying the requirement of being a person of good moral character as defined in section 101(f) of the INA, 8 U.S.C. § 1101(f) (1987). On January 12, 1994, the Board of Immigration Appeals ("Board" or "BIA") dismissed his appeal. He did not seek judicial review at that time.

The INS sought to execute Mejia's final order of deportation in 1995. However, rather than report for his deportation, Mejia absconded, becoming a fugitive from justice for over two years.

On May 21, 1997, Mejia petitioned the Florida state court for a writ of error *coram nobis*, seeking a vacatur of his drug trafficking conviction because he allegedly was not adequately informed of the immigration consequences of his *nolo contendere* plea. On August 1, 1997, the state court granted Mejia's petition. The State's Attorney then announced a *nolle prosequi* of the charges against Mejia.

On September 23, 1997, the INS took Mejia into custody in order to execute the BIA's final order of deportation that had been entered in 1994. Mejia filed a request for a stay of deportation with the INS on September 24, 1997. On September 26, 1997, Mejia filed a motion to reopen his deportation proceedings with the IJ and the BIA, citing the vacatur of his conviction.

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B. Mejia's Habeas Petitions

On September 26, 1997, Mejia filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida, seeking a stay of his deportation, release from custody, and a hearing on his application for relief from deportation. Mejia argued in the petition that the immigration judge's finding of ineligibility for suspension of deportation, based on Mejia's criminal conviction, was tainted by ineffective assistance rendered in the criminal proceeding. The district court denied Mejia's petition and stay request on September 26, 1997. On October 2, 1997, Mejia sought reconsideration of that order. On November 14, 1997, the district court denied Mejia's motion for reconsideration and denied his habeas petition, finding that it was premature given that the INS had not yet ruled on a previously-filed request for stay of deportation.

Mejia filed a Renewed Petition for Writ of Habeas Corpus on November 24, 1997, again asking for a stay of deportation, release from INS custody, and an order that his deportation proceedings be reopened. On March 12, 1998, the district court dismissed Mejia's renewed petition.

Mejia filed an appeal of that order and filed with this Court a request for a stay of the order pending appeal. This Court, on March 13, 1998, temporarily stayed the district court's order pending further review, and on March 26, 1998, entered an order staying the district court's order pending resolution of *Richardson v. INS*, No. 98-4210.

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C. The Withdrawn Decision In *Rodriguez v. Reno*

On January 4, 1999, the Court published its first decision in the appeal from the district court decision, in *Rodriguez v. Reno*, 164 F.3d 575 (11th Cir. 1999). In its decision, the Court followed the initial holding of *Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998), which had concluded that INA § 242(g), as enacted by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), bars district court review of removal cases. The Court found that INA § 242(g) applied to cases commenced before IIRIRA's general effective date of April 1, 1997, such as Mejia's case. *Rodriguez*, 164 F.3d at 579. The Court also determined that INA § 242(g)'s limitation on jurisdiction comported with due process and Suspension Clause concerns. "The hurdles Mejia currently faces arise because of Mejia's failure to seek judicial review [of his 1994 order of deportation], or to file a motion to reopen his deportation proceedings, in a timely manner." *Rodriguez*, 164 F.3d at 580.

On February 24, 1999, the Supreme Court issued its decision in *Reno v. American-Arab Anti-Discrimination Comm.*, 119 S. Ct. 936 (1999) ("*AADC*"), which limited the scope of INA § 242(g) to three distinct categories of cases, while concluding that INA § 242(g) does limit district court jurisdiction in the cases to which it applies. On March 5, 1999, this Court vacated *sua sponte* its opinion in *Rodriguez* (*see Rodriguez v. Reno*, 168 F.3d 1305 (11th Cir. 1999)), and re-submitted the case for decision.

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D. The Board's Denial Of Mejia's Motion To Reopen

On November 27, 1998, the Board denied Mejia's motion to reopen. The Board determined that pursuant to 8 C.F.R. § 3.2(c)(2), a motion to reopen in any case previously the subject of a final decision by the Board must be filed not later than ninety days after the decision, or by September 30, 1996, whichever is later. The Board found that Mejia's motion was filed in 1997, well after either deadline. The Board therefore denied the motion as untimely. On December 15, 1998, Mejia filed a petition for review of that decision in the court of appeals. The Court consolidated the petition for review and the appeal from district court.

E. The Ultimate Decision In *Mejia-Rodriguez v. Reno*

On June 22, 1999, the Court issued its decision regarding the consolidated cases. *See Mejia-Rodriguez v. Reno*, 178 F.3d 1139 (11th Cir. 1999). In its decision, the Court noted that it had before it both Mejia's appeal from the denial of his petition for writ of habeas corpus, and his petition for review of the Board's denial of his motion to reopen. *Mejia*, 178 F.3d at 1144. The Court observed that the two petitions raised similar issues. *Id.* Because the Court conducted full review of Mejia's claims through his petition for review, it dismissed the appeal of the denial of habeas as moot, and declined to determine whether habeas jurisdiction was available in the district court. *Id.*

The Court also declined to reach the issue of whether Mejia's case fell under IIRIRA's "transition rules" because his proceedings commenced prior to April 1, 1997, or under

IIRIRA's "permanent rules" because his motion to reopen was filed after that date. *Mejia*, 178 F.3d at 1144. The Court noted a split in the circuits as to whether a motion to reopen constitutes a new proceeding or a continuation of former proceedings. *Id.* The Court observed that if this were a "transition rule" case, it would be governed by former INA § 106, as amended by IIRIRA § 309(c)(4). *Id.* The Court explained that if the case were governed by the new provisions, it would fall under new INA § 242, including INA § 242(b)(9). Under either circumstance, the court of appeals had jurisdiction over the petition for review, and a determination of precisely which jurisdictional provisions governed was therefore unnecessary. *Id.*

On the merits, the Court concluded that the Board did not abuse its discretion or violate due process in concluding that Mejia's motion to reopen was untimely under 8 C.F.R. § 3.2(c)(2) (1998). *Mejia*, 178 F.3d at 1145. The Court held that time limitations are not inherently suspect. *Id.* The Court determined that "[s]tatutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Id.* at 1145, *quoting Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980). The Court concluded that "even assuming that Mejia suffered a constitutional violation in his deportation proceedings, the application of the limitations period from 8 C.F.R. § 3.2(c)(2) does not raise constitutional concerns merely because it leaves Mejia without a remedy for vindicating his assumed constitutional injury." *Mejia*, 178 F.3d at 1145.

The Court rejected Mejia's ineffective assistance of counsel challenge. *Mejia*, 178 F.3d at 1146. In beginning its

analysis, the Court stated that Mejia did not dispute his deportability based on his overstay of his nonimmigrant visa. *Id.* Thus, the Court concluded, the ineffectiveness of counsel was limited to his counsel's performance as it affected his application for relief from deportation. *Id.*

The Court concluded that any ineffectiveness in counsel's handling of Mejia's application for discretionary suspension of deportation did not violate due process because the failure to receive purely discretionary relief does not amount to a deprivation of a constitutionally protected liberty interest. *Mejia*, 178 F.3d at 1146, *citing Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981). The Court determined that suspension of deportation was an "act of grace" which did not give rise to a liberty interest. The Court then held that "an attorney's deficient representation does not deprive an alien of due process if the deficient representation merely prevents the alien from being eligible for suspension of deportation." *Mejia*, 178 F.3d at 1148. "An alien's actual chances of receiving such discretionary relief are too speculative, and too far beyond the capability of judicial review, to conclude that the alien has actually suffered prejudice from being ineligible for suspension of deportation." *Id.*

> In other words, an alien has not been deprived of "fundamental fairness" simply by being ineligible for a purely discretionary "act of grace" like suspension of deportation. The alien cannot demonstrate prejudice, much less substantial prejudice, arising from the ineligibility for such an "act of grace" because no standards exist for a

> court to determine whether the executive would have granted the extraordinary relief anyway.

Id. at 1148.

The Court further held that "Mejia does not, and cannot, establish that, but for his counsel's deficient representation, he would not have been ordered deported." *Id.* Specifically, Mejia had failed to show that if counsel's ineffectiveness had not precluded him from satisfying the "good moral character" requirement for suspension, he would have been able to satisfy the separate "extreme hardship" requirement, and ultimately would have received a favorable exercise of discretion.

ARGUMENT

I. THE COURT SHOULD DENY THE REHEARING PETITION BECAUSE THERE IS NEITHER AN INTRA-CIRCUIT CONFLICT NOR A SIGNIFICANT LEGAL QUESTION WITH RESPECT TO THE COURT'S JURISDICTIONAL FINDING

The Court should deny Mejia's rehearing petition because the instant case does not create an intra-circuit conflict and because Mejia's rehearing petition presents no meritorious arguments. *See* Fed. R. App. P. 35(a)(1) & 40(a)(2).

Appendix O

A. The Court Afforded Full Judicial Review Of Mejia's Claims Through His Petition For Review, And Was Not Required To Review The Denial Of His Habeas Petition

The Court should reject the jurisdictional arguments in the rehearing petition because the Court afforded unrestricted review of Mejia's substantive claims, with no jurisdictional limitations. The Court's decision specifically found that under either the transition rules or the permanent rules of IIRIRA, the court of appeals had jurisdiction to review all of Mejia's claims. *Mejia*, 178 F.3d at 1144. The Court observed that the petition for review and the petition for writ of habeas corpus raised similar issues. *Id.* The Court also observed that Mejia's brief acknowledged that if he is afforded full review on the petition for review, the Court need not address the habeas petition. *Id.* Having afforded full review of the issues through the review petition, the Court properly dismissed the habeas appeal as moot, and declined to determine whether habeas jurisdiction was properly exercised by the district court. *Id.*

Similarly, Mejia does not qualify for review by way of habeas corpus because he was afforded review in the court of appeals. In *Mayers*, this Court declined to determine the full scope of habeas review, but did suggest that it was unavailable if the alien could get review in the court of appeals:

> [W]e hold only that in the circumstances presented in the case where petitioners' claims are ones affecting substantive rights that traditionally have

> been reviewed by courts even in the most restrictive immigration schemes, and *where petitioners have no other avenue for relief*, we exercise habeas corpus jurisdiction in these narrow circumstances and leave to another day a determination whether habeas corpus jurisdiction would be available in other circumstances.

Mayers, 175 F.3d at 1301 n.17 (emphasis added). Subsequently, in *Richardson II*, this Court stated that it was "crucial" in *Mayers* that, among other things, "the aliens had been unable to obtain any judicial review whatsoever in the court of appeals." 180 F.3d at 1316 n.6[1] That conclusion is consistent with the decisions of other circuits, such as the Fifth Circuit. In *Rivera-Sanchez v. Reno*, __ F.3d __, 1999 WL 1146750 at *2 (5th Cir. Dec. 30, 1999), that Court held that under the transition rules, "habeas jurisdiction exists only where challenges cannot be considered on direct review by the court of appeals."

In any event, because Mejia was afforded full review through a petition for review, and the Court accordingly

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1. Recently, this Court has issued another decision regarding the availability of habeas relief under IIRIRA's transition rules. *See Alanis-Bustamante v. Reno*, __ F.3d __, 2000 WL 58311 (11th Cir. Jan. 25, 2000). *Alanis-Bustamante* did nothing to enlarge the scope of habeas corpus jurisdiction, as that case presented an issue similar to that presented in *Mayers*, which presumably would have been unreviewable in the court of appeals on petition for review. Whether *Alanis-Bustamante* conflicts with certain statements in *Richardson II* is an open question, but this case presents no vehicle to correct such a conflict. The government is in the process of exercising its judgment whether to seek further review of *Alanis-Bustamante*.

declined to address issues relating to habeas jurisdiction at all, this case does not and cannot present an intra-circuit conflict regarding such issues. As discussed *infra*, this case is not an appropriate vehicle for resolving habeas issues that other cases may raise.

B. Mejia's Suggestion That He Did Not Receive Full Review Is Incorrect

Mejia apparently disputes that he received full review, asserting that the Court "refus[ed] to hear [his] Sixth Amendment claim on habeas corpus," and that the Court "depriv[ed] Mr. Mejia of *all judicial review* of that constitutional claim." Reh'g Pet. at 8-9 (emphases in original).[2] His assertion is incorrect.

Mejia is mistaken when he suggests that the Court "refused" to hear his Sixth Amendment claim. Indeed, the Court was quite clear in its analysis of his right to counsel. The Court pointed out that there is a right to effective assistance of counsel in deportation proceedings. *Mejia*, 178 F.3d at 1146, citing *Barthold v. INS*, 517 F.2d 689, 690 (5th Cir. 1975). The Court stated further that a deportation proceeding (but not a request for discretionary *relief* from deportation) implicates an alien's liberty interest, which is protected by the Due Process Clause of the Fifth Amendment. *Mejia*, 178 F.3d at 1146. Based on its survey of cases, the Court concluded that the right to counsel stems from the Due

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2. The abbreviation "Reh'g Pet." followed by a number refers to a specific page of the Petition for Rehearing and Rehearing En Banc.

Process Clause, not the Sixth Amendment's Right to Counsel Clause. *Id.*

While the Court did not write an exegesis on the topic, its review of cases is sufficient to reveal that it did not need to elaborate further on the Sixth Amendment claim. The Court's reliance on *Barthold* should be sufficient. In *Barthold*, the former Fifth Circuit held that an alien's right to counsel in deportation proceedings stems not from the Sixth Amendment, but from the Fifth Amendment. 517 F.2d at 690. The basis for the *Barthold* Court's decision was that deportation proceedings are civil, not criminal. *Id.*; *see also INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing"). The holding of the former Fifth Circuit is binding on the Court; it need not revisit an issue disposed of by *stare decisis*. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (adopting decisions of the Fifth Circuit entered on or before September 30, 1981, as circuit precedent). Indeed, Mejia's Brief of Petitioner-Appellant specifically acknowledged *Barthold* and that the Sixth Amendment has no application in deportation proceedings. Brief of Petitioner Appellant at 31-32 n.16.

Mejia also apparently seeks to use habeas review of his deportation order as a device for challenging the sufficiency under the Sixth Amendment of his *criminal* proceedings. Such a use, however, is clearly prohibited. The courts have long recognized that an alien cannot overturn a deportation order by raising a collateral attack against a criminal

conviction. *See* discussion at section II.B, *infra*. Thus, this Court afforded Mejia all the review that was proper.[3]

C. This Case Is Not Part Of An Intra-Circuit Conflict Regarding Habeas Corpus Review

With regard to the availability of district court habeas review of deportation and removal orders, Mejia argues that the Court's decision in his case evinces a "disharmony" between the Court's decisions in *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999), and *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999) ("*Richardson II*"). Reh'g Pet. at 8. However, the "disharmony" suggested by Mejia does not exist.

As an initial matter, even if there were an intra-circuit conflict between other cases, the instant case would not be the appropriate vehicle for addressing it, as previously discussed. The Court specifically declined to determine whether habeas corpus jurisdiction remained in the district court, because the Court in any event had afforded Mejia meaningful review of all his issues. *Mejia*, 178 F.3d at 1144.

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3. Mejia appears to argue that if the district court does not conduct habeas review of his state criminal proceedings for purposes of assessing the validity of his deportation order, he will never receive habeas review of the criminal proceedings because he is no longer in state custody. Reh'g Pet. at 9-10. Even if he is right, such a consequence is immaterial. The Supreme Court has held that habeas review of a criminal conviction is simply unavailable if the petition is not filed until after the sentence's expiration, notwithstanding any continuing collateral consequences of the conviction. *See Maleng v. Cook*, 490 U.S. 488, 490-92 (1989). The Court has not found any constitutional problems with that situation.

Mejia has no basis for complaining that such review came by way of petition for review as opposed to habeas corpus.

Further, there is no intra-circuit conflict between *Richardson II* and *Mayers*, as those two cases are readily harmonized. In the initial decision in *Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998) ("*Richardson I*"), *vacated* 119 S. Ct. 2016 (1999), *reaffirmed in part*, 180 F.3d 1311 (11th Cir. 1999), the Court had determined that new INA § 242 — particularly INA § 242(b)(9) & (g) — precluded review of removal orders by way of habeas corpus in the district court. Shortly after *Richardson I*, the Supreme Court issued a decision limiting the scope of INA § 242(g). *AADC*, 119 S. Ct. at 943-44.

After *AADC*, this Court issued its decision in *Mayers*, *supra*. In *Mayers*, the Court determined that neither INA § 242(g) nor any other applicable provision functioned to preclude all review of final orders of deportation by way of habeas corpus. *Mayers*, 175 F.3d at 1297. *Mayers*, however, recognized that it was deciding jurisdiction under IIRIRA's transition rules, not the permanent rules involved in *Richardson I*. *Id.* at 1297 n.9.

After a vacatur and remand of *Richardson I* by the Supreme Court for reconsideration in light of *AADC*, this Court reaffirmed its prior decision in *Richardson I*, with the exception of its reliance on INA § 242(g). *Richardson II*, 180 F.3d at 1318. The Court was careful to point out that *Mayers* involved IIRIRA's transition rules, not the permanent rules. *Id.* at 1316 n.6. In particular, the Court pointed out that most of the provisions of new INA § 242, including the

"zipper clause" at INA § 242(b)(9)[4] that channels all review of removal proceedings into the courts of appeals, did not apply to transition rule cases. *Id.* Moreover, the Court limited *Mayers*' applicability even in transition rule cases, by recognizing that *Mayers* involved very particular circumstances which permitted the use of habeas corpus proceedings: (1) the aliens were subject to final orders of deportation after BIA review; (2) the aliens first had filed a petition for review in the court of appeals before seeking § 2241 habeas; (3) the aliens were unable to obtain any judicial review whatsoever in the court of appeals; and (4) the cases in the court of appeals were dismissed before the Court's decision in *Letman v. Reno*, 168 F.3d 463 (11th Cir. 1999), *reh'g granted in part*, 185 F.3d 1216 (11th Cir. 1999), which recognized the court of appeals' jurisdiction to review issues relating to deportability, even in cases involving aliens otherwise barred from appellate review.

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4. INA § 242(b)(9) provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceedings brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9). The Supreme Court has characterized INA § 242(b)(9) as a "zipper clause" which means "no judicial review in deportation cases unless this section provides judicial review," which ultimately places judicial review of typical removal orders in the court of appeals. *AADC*, 119 S. Ct. at 943; *see also Richardson II*, 180 F.3d at 1315.

Thus, *Richardson II*'s discussion of *Mayers* harmonized the two cases in light of their respective applicable statutory provisions. *Richardson II*, unlike *Mayers*, involved new INA § 242, which contains several provisions which are not present in former INA § 106. INA § 242(b)(9), for example, has no analogous provision in INA § 106. The absence of a "zipper clause" in the latter section is enough to justify the distinction between transition rule and permanent rule cases. Indeed, this Court is not alone in acknowledging the difference. *See, e.g., Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 306 (5th Cir. 1999).

II. THE COURT'S DUE PROCESS HOLDING IN *MEJIA* IS CORRECT

A. Mejia's Due Process Claim Is Misguided Because The Board Properly Denied His Motion To Reopen As Untimely

The Court need not reconsider its Due Process holding in this case. In its ultimate decision in this case, the Court correctly determined that the Board appropriately denied the motion to reopen as untimely. *Mejia*, 178 F.3d at 1145. "[E]ven assuming that Mejia suffered a constitutional violation in his deportation proceedings, the application of the limitations period from 8 C.F.R. § 3.2(c)(2) does not raise constitutional concerns merely because it leaves Mejia without a remedy for vindicating his assumed constitutional injury." *Id.*

Mejia's rehearing petition fails to make any effort to challenge the Court's conclusion as to the constitutionality

of time limits. Rather, he has elected only to challenge the Court's jurisdictional and "liberty interest" conclusions. His failure to address the core "time limit" issue makes it unnecessary for the Court to reconsider its due process position, for even if there were a constitutional problem with his deportation proceedings, his motion to reopen those proceedings was indisputably untimely, and the time limit on motions to reopen does not raise constitutional concerns.[5]

B. Mejia Improperly Makes His State Criminal Proceedings The Basis Of His Due Process Challenge

Mejia's petition for rehearing improperly claims that he was denied effective assistance of counsel in his deportation

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5. Nor was the Board required to reopen the case *sua sponte*. In its ultimate decision in this case, the Court left open the question of whether a refusal to reopen *sua sponte* was reviewable by the federal courts. Subsequently, however, the Court decided *Anin v. INS*, 188 F.3d 1273 (11th Cir. 1999), which determined that the Board's *sua sponte* reopening authority was nonreviewable discretion. *Anin*, 188 F.3d at 1279; *see also Luis v. INS*, 196 F.3d 36 (1st Cir. 1999). Further, as the Court in the instant case recognized, the Board was justified in not exercising its extraordinary *sua sponte* authority, given that Mejia failed to challenge his deportation order when it was originally entered and instead absconded from 1995 until 1997. *See Mejia*, 178 F.3d at 1145 n.5. As the Court also observed, Mejia did not demonstrate that but for the alleged due process violation, he would have received suspension of deportation, given that (among other things) he failed to show an ability to satisfy the "extreme hardship" requirement for such relief. *Id.* at 1148. Thus, reopening, *sua sponte* or otherwise, was not warranted.

proceedings because he was denied effective assistance of counsel in his state criminal proceedings. Reh'g Pet. at 10-12. This attempt to bootstrap his due process claim onto an alleged flaw in his criminal proceedings is impermissible.

It is well settled that an alien may not collaterally attack his criminal proceedings in his immigration proceedings. *Zinnati v. INS*, 651 F.2d 420, 421 (5th Cir. Unit A July 24, 1981). Here, Mejia's claim that he was given ineffective assistance of counsel in his criminal proceedings is such a collateral attack. His attack is no different from an attack in deportation proceedings on a prior conviction on the basis that the alien was uninformed of the immigration consequences — an attack which is impermissible. *See De la Cruz v. U.S. INS*, 951 F.2d 226, 228 (9th Cir. 1991). Whether Mejia's immigration proceedings were "fundamentally fair" does not depend on whether his criminal conviction was appropriate. If that were the case, the door would be open for collateral attacks on criminal convictions. Those attacks, however, are not permitted.

C. The Court Correctly Determined That Mejia Was Unable To Demonstrate Substantial Prejudice Resulting From Counsel's Ineffectiveness

1. There is no liberty interest in suspension of deportation

The Court's conclusion that there is no constitutionally protected liberty interest in suspension of deportation is correct. The Court has determined that aliens do not have a liberty interest in receiving suspension of deportation because

it is a form of discretionary relief. *Mejia*, 178 F.3d at 1146. That determination has since been re-affirmed by this and other courts. *See Tefel v. Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999), *reh'g denied, cert. petition pending*; *Appiah v. U.S. INS*, __ F.3d __, 2000 WL 43717 at *5 (4th Cir. Jan. 20, 2000). Based on that determination, this Court concluded that for purposes of proving a due process violation, Mejia was unable to demonstrate that his attorney's conduct substantially prejudiced his ability to receive relief. *Mejia*, 178 F.3d at 1146-48. The likelihood of receiving such relief was "too speculative, and too far beyond the capability of judicial review to conclude that the alien has actually suffered prejudice." *Id.* at 1148. That decision is correct, does not conflict with circuit precedent, and should be maintained.

Mejia argues that *Mayers* is contrary to the Court's decision in this case. Reh'g Pet. at 13. That argument, however, is incorrect. The *Mayers* Court did analyze an alien's expectation of discretionary relief, but only in the context of determining whether a limitation on discretionary relief was improperly retroactive for statutory construction purposes under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), not whether there was a liberty interest for due process purposes. *Mayers*, 175 F.3d at 1303.[6] Moreover, the

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6. Mejia also cites *Mayers*' holding that habeas jurisdiction is available in certain "transition rule" cases for review of statutory construction issues relating to eligibility for discretionary relief. Reh'g Pet. at 13-14. But that holding was purely jurisdictional, addressing the nature of the questions reviewable under § 2241 habeas. It again does not bear on the question addressed by the Court in this case — *i.e.*, whether an alien can have a liberty interest in discretionary relief from deportation, for purposes of the Due Process Clause.

Mayers Court had already concluded that, even apart from a *Landgraf* analysis, Congress had expressed an intent that the limitation on discretionary relief should not be applied to pre-enactment deportation proceedings. *Mayers*, 175 F.3d at 1302. Since then, the Court has determined that the *Mayers* Court's *Landgraf*-related statements regarding an alien's rights to, or expectations for, discretionary relief are dicta. *Mejia*, 178 F.3d at 1149 n.9. Indeed, the Court has since concluded that for purposes of the "settled expectations" aspect of the *Landgraf* analysis, an alien has no settled expectation to remain eligible for discretionary relief. *Tefel v. Reno*, 180 F.3d at 1302. Moreover, the *Tefel* Court also concluded that an alien has no constitutionally protected "liberty interest" in discretionary relief from deportation. *Id.* at 1300. Thus, Mejia's argument is without merit, and the Court should deny the rehearing petition.

2. This case does not involve the denial of any "right to apply" for discretionary relief

a. Mejia cannot rely on a "right to apply" as creating a liberty interest

Mejia improperly attempts to characterize his due process claim as involving a liberty interest in an opportunity "to apply" for relief. His argument is without merit.

Essentially, Mejia's argument misses the point. In the instant case, the Court determined that in order to raise a due process ineffective assistance of counsel claim, an alien must show actual and substantial prejudice. *Mejia*, 178 F.3d at 1148. The point of the Court is that in order to show such prejudice, the alien must demonstrate that he would have

received relief absent the attorney's failure. *Mejia*, 178 F.3d at 1148; *see also Rabiu v. INS*, 41 F.3d 879, 882-83 (2d Cir. 1994). The Court correctly concluded that Mejia could not prove he would have received relief because it is impossible to predict whether the executive will grant relief that is purely discretionary. *Id.* Accordingly, the Court should deny the rehearing petition.

Moreover, Mejia cannot rely on a "right to apply" as the basis for his "liberty interest." This Court has previously stated that, under certain circumstances, where regulations or statutes afford a person an opportunity to apply for relief, an agency may not deny such an opportunity. *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982) ("*HRC*"). However, *HRC* indicated that the "right to apply" consists of the ability to submit an application (which Mejia did). *HRC*, 676 F.2d at 1038 ("Congress and the executive have created, at a minimum, a constitutionally protected right to petition our government for asylum"). Under *HRC*, the "right to apply" is implicated only where "[the government] creates a right to petition and then makes the exercise of that right utterly impossible. *HRC*, 676 F.2d at 1039.

Moreover, the en banc Eleventh Circuit has largely disfavored and limited *HRC*. *See Jean v. Nelson*, 727 F.2d 957, 981 (11th Cir. 1984) (en banc), *aff'd on other grounds*, 472 U.S. 846 (1985). In holding that the government had no constitutional obligation to advise aliens of the opportunity *to apply* for asylum, the *Jean* Court stated:

> [W]hen dispensation of a statutory benefit is clearly at the discretion of an agency, or when a statute only provides that certain procedural

> guidelines be followed in arriving at the decision, then there is no creation of a substantive interest protected by the Constitution.

Jean, 727 F.2d at 981 (citations omitted).

Further, in *Shvartsman v. Apfel*, 138 F.3d 1196 (7th Cir. 1998), the Seventh Circuit held that when there is no constitutionally protected interest in receiving a benefit, there also is no constitutionally protected interest in a "fair opportunity" to prove eligibility for that benefit. "[D]efining access to procedures as a protectable property interest would eliminate the distinction between property and the procedures that are constitutionally required to protect it." *Shvartsman*, 138 F.3d at 1199.

> The problem with plaintiffs' argument is that in theory, almost any procedure can be cast in terms of providing a "fair opportunity" to obtain the substantive benefit that might lie at the end of the procedure. That is what procedures are for. To characterize this feature as creating property rights, however, would make the scope of the Due Process Clause virtually boundless. It would also raise insurmountable practical and conceptual difficulties.

Id. at 1199-1200. *See also Fleury v. Clayton*, 847 F.2d 1229, 1231 (7th Cir. 1988) ("There is neither a 'liberty' nor a 'property' interest in procedures themselves").

The conclusions of this Court and the courts in *Jean* and *Shvartsman* are well-founded. The Supreme Court has emphasized that: "Process is not an end in itself. Its

constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). *See also Velasco-Gutierrez v. Crossland*, 732 F.2d 792, 798 (10th Cir. 1984) (citing *Olim* in holding that aliens who had no constitutionally protected interest in obtaining "deferred action status" also had no protected interest in "being considered for" that benefit; aliens' argument "misconceive[d] the nature of constitutionally protected interests."). Thus, a due process claim must have as its ultimate end a benefit that the claimant is substantively entitled to receive; no liberty interest exists in particular procedures themselves. This Court appropriately determined that in Mejia's case, he must demonstrate that his attorney's ineffectiveness deprived him of a constitutionally protected liberty interest in receiving suspension of deportation. Because there is no liberty interest in discretionary relief, the Court correctly concluded that Mejia cannot make such a showing. Thus, the Court should deny the rehearing petition.

b. Mejia was not deprived of the "right to apply" for discretionary relief

Furthermore, Mejia was never denied the "right to apply." Mejia's attorneys did apply for relief.[7] That

7. Indeed, it is the fact that Mejia's attorneys did apply for and pursue discretionary relief which makes Mejia's case different from *Rabiu v. INS, supra*. In *Rabiu*, the Second Circuit concluded that an alien's attorney's failure to file a timely application for relief abridged the right to effective assistance of counsel. *Id.* at 882. Here, the attorney did file the application and zealously argued on Mejia's behalf.

application was adjudicated. The INS moved to "pretermit" the application (the administrative equivalent of summary judgment under the Federal Rules of Civil Procedure) — a tactic authorized by the Supreme Court in *INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976). In adjudicating the motion, the immigration judge determined that Mejia was substantively ineligible for suspension, based on his conviction for a controlled substance violation. His attorney made arguments in an effort to ameliorate the effect of his prior conviction. To some degree, the attorney was successful: the government dropped the criminal charge of deportability. The attorney also was partly unsuccessful, insofar as the immigration judge relied on the conviction to deny discretionary relief. Regardless, there is no question that Mejia was permitted to apply for, and pursue, relief, and that the relief was ultimately denied because of *substantive* ineligibility.[8]

Thus, Mejia's challenge extends well beyond any mere "right to apply." As framed, his challenge argues that, as a necessary part of the "right to apply," an attorney must perfect an alien's substantive eligibility for the desired relief before deportation proceedings commence. Mejia would have

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8. Mejia inaccurately suggests that the Fifth Circuit has determined that the "failure to apply" for discretionary relief constitutes ineffective assistance, relying on *Miranda-Lores v. INS*, 17 F.3d 64 (5th Cir. 1994). Reh'g Pet. at 11. In *Miranda-Lores*, the Fifth Circuit only assumed, without deciding, that there was ineffective assistance of counsel. 17 F.3d at 85. *Miranda-Lores*, however, did determine that there was no prejudice for due process purposes unless the alien could prove that "he would have been entitled to relief from deportation. . . ." *Id.* As this Court has properly determined, an alien cannot prove an entitlement to discretionary relief. *Mejia*, 178 F.3d at 1146-48; *see also Tefel*, 180 F.3d at 1300.

the Court rule that if an attorney fails to get a conviction lifted so as to assure his client's eligibility for discretionary relief, the attorney's assistance becomes so "inadequate" as to render deportation proceedings "fundamentally unfair." However, in addition to reflecting an improper collateral attack on a criminal conviction, that suggestion so deeply involves the case's actual merits that it implicates much more than a "right to apply."

The ruling desired by Mejia goes well beyond the meaning of the limited "right to apply" recognized in *HRC*, and looks more like the "fettering" of agency procedure which was prohibited in *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981). In *Dumschat*, the Supreme Court determined that a criminal detainee had no liberty interest in a pardon. *Id.* at at 464-66. It reversed the court of appeals' decision to place procedural requirements — such as a statement of reasons for a denial — on the pardon consideration, in the absence of a liberty interest. *Id.* at 466. Here, Mejia would require that a competent attorney take any and all steps outside of immigration proceedings to preserve and protect an alien's immigration expectations. He cannot bootstrap onto any "right to apply" a rule which has clear ramifications relating to the merits of the application, just as the Supreme Court did not do so in *Dumschat*.[9]

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9. Mejia actually relies on *Dumschat* as recognizing a "right to apply." Reh'g Pet. at 12 n.8. That reliance, however, is mistaken. The Supreme Court's statement regarding a "right to seek [relief]" consisted of one terse reference that was not necessary to the *Dumschat* holding. 452 U.S. at 467. More importantly, the Court did not characterize the "right to apply" as including the right to an attorney who will ensure substantive eligibility for the desired relief.

Appendix O

CONCLUSION

The Court should deny Mejia's Petition for Rehearing and Petition for Rehearing En Banc.

Respectfully submitted,

THOMAS E. SCOTT
United States Attorney

DEXTER LEE
Assistant United States Attorney
99 N.E. 4th Street
Miami, FL 33132

DAVID W. OGDEN
Acting Assistant Attorney General

DAVID V. BERNAL
Assistant Director

LINDA S. WENDTLAND
Senior Litigation Counsel

s/ Ernesto H. Molina, Jr.
ERNESTO H. MOLINA, JR.,
Attorney
Office of Immigration Litigation
Civil Division
Department of Justice
P.O. Box 878,
Ben Franklin Station
Washington, D.C. 20044
(202) 616-9344

Date: February 21, 2000

ATTORNEYS FOR RESPONDENTS/APPELLEES

APPENDIX P — EXCERPTS FROM COURT OF APPEALS RECORD

[Omitted here but submitted separately as Lodging Appendix]

Supreme Court, U.S.
FILED
OCT 27 2000
OFFICE OF THE CLERK

No. 99-2085

In the Supreme Court of the United States

ERNESTO ALONSO MEJIA RODRIGUEZ, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court has jurisdiction under 28 U.S.C. 2241 to review petitioner's claim that he was unconstitutionally deprived of his opportunity to apply for suspension of deportation.

2. Whether petitioner's deportation proceedings denied him due process because petitioner's privately retained attorney failed to perfect his application for a purely discretionary form of relief from deportation.

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In the Supreme Court of the United States

No. 99-2085

ERNESTO ALONSO MEJIA RODRIGUEZ, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 178 F.3d 1139. The orders of the district court (Pet. App. 46a-49a, 50a-52a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 22, 1999. A petition for rehearing was denied on March 29, 2000. Pet. App. 68a-69a. The petition for a writ of certiorari was filed on June 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. With the passage in 1996 of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996), Congress enacted several major

changes to the Nation's immigration laws. Those changes were designed, in large part, to reduce the opportunities for criminal aliens to obtain administrative relief from deportation and to expedite their removal from the United States by restricting and streamlining judicial review of their deportation orders.

a. Prior to the 1996 legislation, an alien who was subject to deportation could apply for suspension of deportation and adjustment of status to that of a lawful permanent resident. 8 U.S.C. 1254(a) (1994). Such relief was available in the discretion of the Attorney General. To qualify for consideration for suspension of deportation, the alien was required to demonstrate, *inter alia*, that he had been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application [for relief]," that he was of "good moral character," and that his deportation would result in "extreme hardship" to himself or a spouse, parent, or child who was a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1) (1994). The alien could obtain judicial review of a final order of deportation (which included any denial of discretionary relief from deportation) by filing a petition for review in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (repealed 1996) (incorporating Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*). In addition, under certain circumstances, an alien held in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996).

b. IIRIRA abolished the old distinction between deportation and exclusion proceedings, repealed the

provision for suspension of deportation in former 8 U.S.C. 1254(a) (1994), instituted a new form of proceeding known as "removal," and established a new form of discretionary relief from removal, known as "cancellation of removal," which replaced the prior provisions for discretionary suspension of deportation and for waiver of inadmissibility under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994). See 8 U.S.C. 1229, 1229b (Supp. IV 1998). The Attorney General may, in her discretion, cancel the removal of an alien if the alien demonstrates, among other things, that he has resided in the United States continuously for seven years (if the alien is a lawful permanent resident) or has been continuously present here for ten years (if the alien is not a lawful permanent resident), is of good moral character, and his removal would cause extreme hardship to a spouse or child. 8 U.S.C. 1229b(a) and (b) (Supp. IV 1998).

c. Also in 1996, Congress twice restricted the availability of judicial review of criminal aliens' deportation orders. First, Section 401(e) of AEDPA—which is entitled "Elimination of Custody Review by Habeas Corpus"—eliminated the authorization in 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996) for aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. 110 Stat. 1268. AEDPA replaced that habeas corpus provision with a new 8 U.S.C. 1105a(a)(10), which provided that any final order of deportation against an alien who was deportable for having committed certain criminal offenses "shall not be subject to review by any court." AEDPA § 440(a), 110 Stat. 1277.

Second, IIRIRA created an entirely new judicial review provision in 8 U.S.C. 1252 (Supp. IV 1998), for cases in which aliens were placed in removal pro-

ceedings on or after April 1, 1997. See IIRIRA § 309(a) and (c)(1), 110 Stat. 3009-625.[1] Cases commenced prior to April 1, 1997, including this case, continue to be governed by 8 U.S.C. 1105a, as amended by AEDPA. IIRIRA § 309(c)(2), 110 Stat. 3009-626. Congress also enacted special transitional rules for any cases commenced prior to April 1, 1997, in which the final deportation order was entered on or after October 31, 1996. One such rule reinforces the preclusion of judicial review in amended Section 1105a(a)(10) by providing that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed [specified criminal offenses]." IIRIRA § 309(c)(4)(G), 110 Stat. 3009-626.

2. a. Petitioner is a native and citizen of Honduras who initially entered the United States in 1980 as a non-immigrant visitor for pleasure. Pet. App. 3a. In

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[1] The new Section 1252 provides for judicial review of all final removal orders in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998) (incorporating 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998). Section 1252 also carries forward the preclusion of review in former Section 1105a(a)(10) (as amended by AEDPA Section 440(a)) by providing that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" any one of a number of specified crimes. 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). The new Section 1252(b)(9) further provides sweepingly that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section" —*i.e.*, only in the court of appeals, as provided in Section 1252(a)(1). See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (characterizing Section 1252(b)(9) as an "unmistakable 'zipper' clause").

1986, petitioner was convicted in a Florida state court of trafficking in cocaine, based on a plea of *nolo contendere*. *Ibid.* In March 1990, the INS commenced deportation proceedings against petitioner and charged him with deportability as an alien who had entered the United States without inspection and as an alien convicted of a controlled substance violation. See 8 U.S.C. 1251(a)(2) and (11) (1988). Pet. App. 4a. In December 1990, the INS withdrew those charges and charged petitioner instead with overstaying his non-immigrant visa. *Ibid.*

In August 1991, an immigration judge found petitioner deportable as charged. Pet. App. 5a, 64a-67a. The immigration judge also denied petitioner's request for suspension of deportation under 8 U.S.C. 1254(a) (1988), on the ground that his drug conviction prevented him from making the requisite demonstration of good moral character, see 8 U.S.C. 1101(f) (1988). Pet. App. 67a.

In January 1994, the Board of Immigration Appeals dismissed petitioner's appeal. Petitioner did not seek judicial review of that decision. Pet. App. 7a, 54a. When the INS sought to execute petitioner's final order of deportation, petitioner absconded and remained a fugitive from justice for over two years. *Id.* at 7a-8a.

b. In May 1997, while he remained a fugitive from deportation, petitioner filed a writ of error *coram nobis* with the Florida state court, seeking vacatur of his drug trafficking conviction on the ground that he was not adequately informed of the immigration consequences of his *nolo contendere* plea. Pet. App. 7a-8a. The state court granted the petition, and the State's Attorney then announced a *nolle prosequi* of the charges against petitioner. *Id.* at 8a.

Four months later, the INS took petitioner into custody to execute his two-year old final order of deportation. Pet. App. 8a. At that time, petitioner filed a motion to reopen his deportation proceedings with the immigration judge and the BIA, citing the recent vacatur of his conviction. *Ibid.* The immigration judge refused to accept the motion and, in November 1998, the Board denied petitioner's motion to reopen because it was filed almost a year beyond the time limit established by 8 C.F.R. 3.2(c)(2). On December 14, 1998, petitioner filed a petition for review of the Board's denial of his motion to reopen in the court of appeals. Pet. App. 9a.

c. While his motions before the immigration judge and Board were pending, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida, seeking a stay of his deportation, release from custody, and a hearing on his application for relief from deportation. Pet. App. 9a. The district court denied the habeas petition and stay request. *Ibid.* Petitioner sought reconsideration, which the district court also denied. *Id.* at 50a. In November 1997, petitioner filed a renewed petition for a writ of habeas corpus. In March 1998, the district court dismissed the renewed petition. *Id.* at 46a.

3. The court of appeals subsequently issued a consolidated decision on the petition for review that petitioner filed directly in that court and on petitioner's appeal from the district court's denial of habeas corpus relief. Pet. App. 1a-23a.[2] As an initial matter, because

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[2] The court of appeals initially had affirmed the district court's dismissal of the habeas corpus petition on the ground that 8 U.S.C. 1252(g) (Supp. IV 1998), as added by IIRIRA, barred district court jurisdiction. Pet. App. 39a-40a. However, the court of appeals

petitioner had conceded in his brief that judicial review of the Board's decision on direct review would moot the necessity of reviewing the district court's dismissal of his habeas corpus action (due to the similarity of the claims raised in each forum), the court of appeals reviewed only the Board's decision and dismissed as moot petitioner's appeal from the district court's order dismissing his habeas petition. *Id.* at 11a. The court of appeals thus had no occasion to address whether habeas jurisdiction properly resided in the district court.

The court of appeals also declined to decide whether petitioner's case fell under IIRIRA's transitional rules for judicial review (because his deportation proceedings commenced prior to April 1, 1997) or under IIRIRA's permanent rules (because his motion to reopen was filed after that date). Pet. App. 12a. Resolution of that question was unnecessary, the court explained, because the court "would have jurisdiction over [petitioner's] petition for review under either the pre-IIRIRA or post-IIRIRA [law]." *Ibid.*

On the merits, the court of appeals ruled that the Board did not abuse its discretion or violate due process in denying petitioner's motion to reopen as untimely. Pet. App. 13a. The court reasoned that, "even assuming that [petitioner] suffered a constitutional violation in his deportation proceedings, the application of the limitations period from 8 C.F.R. § 3.2(c)(2) does not raise constitutional concerns merely because it leaves [petitioner] without a remedy for vindicating his assumed constitutional injury." Pet. App. 14a.

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vacated that ruling following this Court's decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, *supra*. Pet. App. 26a-27a.

The court of appeals also rejected petitioner's claim of ineffective assistance of counsel, which petitioner had not presented to the Board. Pet. App. 15a-22a. The court of appeals held that any ineffectiveness in counsel's handling of petitioner's application for discretionary suspension of deportation did not violate due process because the failure to receive an "act of grace," *id.* at 19a, in the form of the purely discretionary relief of suspension of deportation, does not amount to a deprivation of a constitutionally-protected liberty interest, *id.* at 17a. The court reasoned that petitioner's "actual chances of receiving such discretionary relief are too speculative, and too far beyond the capability of judicial review, to conclude that the alien has actually suffered prejudice from being ineligible for suspension of deportation." *Id.* at 20a. The court further concluded that, in any event, petitioner had not established prejudice as a result of counsel's alleged deficiency, because he had not made a strong showing of extreme hardship if he was returned to Honduras.

ARGUMENT

1. Petitioner seeks (Pet. 9-22) this Court's review of the question whether, following IIRIRA, habeas corpus jurisdiction exists under 28 U.S.C. 2241 to challenge a final order of deportation. While petitioner is correct that a conflict in the circuits exists on that question (Pet. 10-11), this case does not present that question. Based on petitioner's representation that his petition for review of the Board's decision encompassed all of the claims raised in his habeas corpus action, Pet. App. 11a, the court of appeals dismissed petitioner's appeal from the district court's decision on his habeas petition as moot, and petitioner has not challenged that aspect of the court of appeals' decision here. The court of

appeals thus did not address the jurisdictional question that petitioner asks this Court to review, and it is entirely unnecessary to the resolution of petitioner's case.

Even if the case did present the jurisdictional question, further review would be unwarranted. Petitioner's challenges are closely related to the issues that were presented in the government's certiorari petitions denied by this Court over a year ago in *Reno* v. *Goncalves*, 526 U.S. 1004 (1999), and *Reno* v. *Navas*, 526 U.S. 1004 (1999), as well as the certiorari petitions filed by aliens and denied by this Court more recently in *Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000), and *LaGuerre* v. *Reno*, 120 S. Ct. 1157 (2000). Especially given that petitioner's appeal of the district court's dismissal of his habeas petition was dismissed as moot, there is no basis in this case for a different disposition. Furthermore, like those cases, this case concerns only issues of jurisdiction relating to deportation proceedings commenced before April 1, 1997, the date on which IIRIRA's permanent judicial review provisions took effect. The number of cases affected by those transitional rules is dwindling, further diminishing the necessity for this Court's review.[3]

2. Petitioner also seeks (Pet. 22-29) this Court's review of the court of appeals' ruling that his due process rights were not infringed by the allegedly ineffective assistance rendered by his privately retained counsel. The court of appeals reasoned that, even if counsel's

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[3] Petitioner's contention (Pet. 15-18) that this case provides an appropriate vehicle for reviewing the availability of habeas jurisdiction under IIRIRA's permanent rules runs even further afield because his case arises under IIRIRA's transitional rules and thus simply does not present that question.

performance had been defective, petitioner had not established a due process violation because (1) "the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest," and (2) petitioner had not, in any event, made a showing of prejudice—an essential element of an ineffective assistance of counsel claim—by showing a likelihood that he would have been granted relief. Pet. App. 17a, 21a n.8, 22a.

It is not clear to what extent the court of appeals in this case intended those two points to be distinct grounds for rejecting petitioner's claim, rather than mutually reinforcing reasons why petitioner had not made a sufficient showing that counsel's allegedly deficient performance may have affected the ultimate outcome of his case. To the extent the two points reflect distinct grounds of decision, the Eleventh Circuit's ruling on the first of those two grounds is inconsistent with the Ninth Circuit's decision in *Castillo-Perez* v. *INS*, 212 F.3d 518 (2000), which found that an alien's failure to apply for suspension of deportation—the same relief petitioner seeks—was due to ineffective assistance of counsel that violated the Due Process Clause, *id.* at 526-527. The Ninth Circuit in *Castillo-Perez*, however, did not address the rationale, set out by the Eleventh Circuit in this case, for why an interest protected by the Due Process Clause may not be implicated in the context of an application for discretionary relief.

The first of the two grounds articulated by the court of appeals in this case is also in substantial tension with *Rabiu* v. *INS*, 41 F.3d 879 (2d Cir. 1994), and *Miranda-Lores* v. *INS*, 17 F.3d 84 (5th Cir. 1994), where the Second and Fifth Circuits held that counsel's failure to seek the discretionary relief of waiver of deportation

violates the Due Process Clause if the alien makes a prima facie showing of eligibility for the relief and a strong showing that discretion likely would have been exercised favorably, taking into account the relevant discretionary considerations. *Rabiu*, 41 F.3d at 882; *Miranda-Lores*, 17 F.3d at 85.

Moreover, the Eleventh Circuit's decision also appears to be contrary to intervening Board precedent. The decision of the Board in *Castillo-Perez, supra*, contemplated that an ineffective assistance of counsel claim will lie in connection with an application for suspension of deportation. *In re Hugo Castillo-Perez*, No. A70 779 196 (BIA July 27, 1999). The Board ultimately denied relief, however, on the ground that an intervening change in the law had rendered Castillo-Perez ineligible for suspension of deportation, but the court of appeals reversed the Board in that respect. 212 F.3d at 528.

3. Despite the tensions between those court of appeals decisions and the decision issued here, plenary review by this Court of the question whether counsel's errors in connection with a possible claim for discretionary relief from deportation can constitute a due process violation would be inappropriate at the present time. In the first place, petitioner did not present his due process claim of ineffective assistance of counsel in the deportation proceedings to the Board, and he therefore neither complied with the procedural requirements of *In re Lozada*, 19 I. & N. Dec. 637 (BIA), aff'd, 857 F.2d 10 (1st Cir. 1988), for presenting such a claim, nor exhausted his administrative remedies on the issue. The Ninth Circuit in *Castillo-Perez* excused compliance with *Lozada* in that case on the ground that counsel's ineffectiveness was apparent on the face of the record. 212 F.3d at 525-526. That is not true here. That

procedural default, which did not occur in *Castillo-Perez*, deprived the Board of the opportunity to consider petitioner's claim on the merits.[4]

Second, in finding a due process violation in *Castillo-Perez*, the Ninth Circuit specifically concluded that the alien had demonstrated prejudice entitling him to relief. 212 F.3d at 527 n.12. The Second and Fifth Circuits similarly held in *Rabiu* and *Miranda-Lores* that a showing of a likelihood of a favorable exercise of discretion was necessary for relief. See *Rabiu*, 41 F.3d at 883; *Miranda-Lores*, 17 F.3d at 85. The Eleventh Circuit in the present case found that petitioner had not made such a showing. Pet. App. 17a.

Third, and more significantly, plenary review is not warranted in this case because the Board of Immigration Appeals has recently ordered briefing, in the case of *In re Maria Rosario Cabral Cruz*, No. A73 419 214 (order issued Sept. 15, 2000), on the predicate question of whether a claim of ineffective assistance of privately retained counsel in immigration proceedings implicates the Due Process Clause at all, in light of this Court's decisions in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), and *Wainwright* v. *Torna*, 455 U.S. 586, 587-588 (1982), discussed below. See also *In re Ingabire*, No. A76 451 961 (BIA Aug. 8, 2000), slip op. 3-6 (Filppu, Board Member, concurring) (expressing the view that ineffective assistance of privately retained counsel in deportation proceedings does not implicate the Due Process Clause).

While an alien has some due process rights in deportation proceedings, see, *e.g.*, *Landon* v. *Plasencia*,

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[4] The Eleventh Circuit did not decide the procedural default issue because it found petitioner's claim to be without merit in any event. Pet. App. 11a-12a n.4.

459 U.S. 21, 32-33 (1982), because deportation proceedings are civil in nature, *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 490; see also *id.* at 491 (interests of individuals in deportation proceedings are "less compelling than in criminal prosecutions"); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038-1039 (1984) (deportation proceeding "is a purely civil action to determine eligibility to remain in this country" prospectively), an alien facing deportation proceedings has no constitutional right to government-provided counsel.[5]

Nevertheless, numerous courts have held, like the Eleventh Circuit here (Pet. App. 16a-17a), that "[i]neffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Lopez* v. *INS*, 775 F.2d 1015, 1017 (9th Cir. 1985); see also *Mustata* v. *United States Dep't of Justice*, 179 F.3d 1017, 1019-1020 (6th Cir. 1999);

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[5] See *Montilla* v. *INS*, 926 F.2d 162 (2d Cir. 1991); *Gandarillas-Zambrana* v. *BIA*, 44 F.3d 1251, 1256 (4th Cir.), cert. denied, 516 U.S. 806 (1995); *Ogbemudia* v. *INS*, 988 F.2d 595, 598 (5th Cir. 1993); *Mustata* v. *United States Dep't of Justice*, 179 F.3d 1017, 1022 n.6 (6th Cir. 1999); *Mojsilovic* v. *INS*, 156 F.3d 743, 748 (7th Cir. 1998); *Singh* v. *Waters*, 87 F.3d 346, 347 (9th Cir. 1996); *Akinwunmi* v. *INS*, 194 F.3d 1340, 1341 n.2 (10th Cir. 1999); *Maldonado-Perez* v. *INS*, 865 F.2d 328, 332-333 (D.C. Cir. 1989). At the time of petitioner's hearing before the immigration judge, Congress had provided by statute that an alien in deportation proceedings shall "have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. § 1252(b)(2) (1994) (amended 1996). A similar provision applies post-IIRIRA. 8 U.S.C. 1229(a)(1)(E) and (b), 1229a(b)(4)(A) (Supp. IV 1998). Aliens thus have no statutory right to government-provided counsel either.

Rabiu, 41 F.3d at 882; *Henry* v. *INS*, 8 F.3d 426, 440 (7th Cir. 1993); *Lozada* v. *INS*, 857 F.2d 10, 13 (1st Cir. 1988); *Paul* v. *INS*, 521 F.2d 194, 197-198 (5th Cir. 1975). The Board itself has acknowledged this right, in light of circuit precedent. See *In re Lozada*, 19 I. & N. Dec. 637, 638 (BIA) (citing court of appeals decisions), aff'd, 857 F.2d 10 (1st Cir. 1988).

No circuit, however, has analyzed or revisited the question of whether ineffective, privately retained counsel implicates the Due Process Clause in light of this Court's decision in *Coleman* v. *Thompson*, 501 U.S. 722 (1991). In *Coleman*, this Court held that, because there is no constitutional right to an attorney in state postconviction proceedings, an incarcerated prisoner "cannot claim constitutionally ineffective assistance of counsel in such proceedings," *id.* at 752. It is only where the Constitution itself requires effective counsel that the ineffectiveness of counsel can be "imputed to the State," as in criminal trials where the Sixth Amendment applies. *Id.* at 754. This Court, moreover, specifically stated that the "fundamental fairness" component of the Due Process Clause—which is what courts have relied on in the immigration context—does not itself guarantee effective counsel in habeas proceedings, even where the petitioner faces a death sentence. *Id.* at 756. Rather, in habeas proceedings, the petitioner "must 'bear the risk of attorney error,'" "ignorance or inadvertence." *Id.* at 753. See also *Wainwright* v. *Torna*, 455 U.S. 586, 587-588 (1982) ("Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely."); *id.* at 588 n.4 ("Respondent was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. Such

deprivation—even if implicating a due process interest —was caused by his counsel, and not by the State. Certainly, the actions of the Florida Supreme Court in dismissing an application for review that was not filed timely did not deprive respondent of due process of law.").

If the Board concludes in *Cruz* that, in light of *Coleman*, it will no longer recognize a due-process-based claim of ineffective assistance of privately retained counsel in a deportation proceeding, then the foundation for the current divergence of views in the courts of appeals on which types of attorney errors might violate the Due Process Clause will be substantially eroded, making this Court's review of that question unnecessary. Such a decision by the Board would also likely lead the courts of appeals to revisit their ineffective assistance of counsel holdings in light of *Coleman*. This Court's review of that constitutional question should properly await initial consideration and analysis by the lower courts. Finally, even if the Constitution does not require the effective assistance of counsel in deportation proceedings, the Board could decide as a matter of administrative discretion to reopen cases in certain circumstances when ineffective assistance of counsel is demonstrated. In that context, however, the Board would have substantial discretion to identify the level and types of attorney errors that will trigger reopening. It is thus appropriate to permit the Board to address these questions in the first instance.

Accordingly, in light of this Court's decision in *Coleman* and the now unsettled status of ineffective assistance claims in deportation proceedings, we suggest that the Court grant the petition for a writ of certiorari limited to the second question presented, vacate the judgment of the court of appeals, and remand the case

to the court of appeals with instructions to remand the case to the Board of Immigration Appeals for disposition in light of the Board's eventual decision in *In re Maria Rosario Cabral Cruz*, No. A73 419 214, concerning the application of *Coleman* v. *Thompson*, 501 U.S. 722 (1991).

CONCLUSION

The petition for a writ of certiorari should be granted limited to the second question presented, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to remand the case to the Board of Immigration Appeals for disposition in light of the Board's eventual decision in *In re Maria Rosario Cabral Cruz*, No. A73 419 214, concerning the application of *Coleman* v. *Thompson*, 501 U.S. 722 (1991).

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

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JANET RENO, Attorney General of the United States and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

ELLIOT H. SCHERKER
Counsel of Record
OSCAR LEVIN
BRENDA K. SUPPLE
GREENBERG TRAURIG, P.A.
Attorneys for Petitioner
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

163303

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

60PP

REASONS FOR GRANTING THE WRIT

Mr. Mejia is gratified by the government's recognition that the second question presented, arising from the denial of relief to Mr. Mejia based on his Fifth Amendment claim of denial of effective assistance of counsel in the immigration proceedings, should be heard by this Court. *See* Brief for the Respondents (Respondents' Brief) at 11-19. The decision in *Castillo-Perez v. INS*, 212 F.3d 518 (9th Cir. 2000), cited by the government, Respondents' Brief at 12, serves only to sharpen the existing conflict among the circuits and to demonstrate the need for a conclusive determination on the question whether an alien who has been denied effective assistance of counsel in connection with an application for discretionary relief from deportation can bring a claim under the Fifth Amendment.[1] Only the Eleventh Circuit expressly has held that no claim of ineffective assistance of counsel can arise under such circumstances. See Petition for Writ of Certiorari (Petition) at 22-29.

The government thus correctly acknowledges the irreconcilable conflict among the circuits on this question. The government's suggestion, however, that the matter should be remanded to the Eleventh Circuit, for further remand to the Board of Immigration Appeals (BIA), Respondents' Brief at 14-15, however, is misdirected.[2] As is noted in the Petition, it is

1. In *Castillo-Perez*, the court was fully cognizant of the discretionary nature of a decision by an immigration judge or the Board of Immigration Appeals on suspension of deportation. 212 F.3d at 523-24. The court nonetheless found "a clear and obvious case of ineffective assistance of counsel" based on the lawyer's failure timely to seek a suspension of deportation on behalf of his client. *Id.* at 526-27. The court further held that the alien had made the requisite "showing of prejudice" because the performance of his counsel had been "so inadequate that it may have affected the outcome of the proceedings." *Id.* at 527 n.2 (citation omitted).

2. The government cites to a BIA order in the pending case of *In re Cruz*, No. A73 419 214 (September 15, 2000). Respondents' Brief

(Cont'd)

not for the BIA to address purely constitutional issues. *See* Petition at 21. This is not an instance in which this Court (or any federal appellate court) requires guidance from a federal agency. *See, e.g., Christensen v. Harris County,* 529 U.S. 576 (2000). Rather, the *purely constitutional question* whether the Fifth Amendment protects an alien against ineffective assistance of counsel arising from failures and omissions by counsel in seeking discretionary relief from deportation is *squarely presented* for this Court's review in this case.[3]

(Cont'd)
at 14. The Executive Office of Immigration Review has advised the undersigned that this order is not available for release absent a Freedom of Information Act request. Mr. Mejia has submitted his request and has asked for an expedited response; the referenced order has not been received as of the filing of this reply.

3. The government suggests that Mr. Mejia's "procedural default" in not raising his claim of ineffective assistance on review of the immigration judge's deportation order serves to warrant further proceedings before the BIA, rather than plenary review at the present time. Respondents' Brief at 13-14. The Eleventh Circuit, however, as the government acknowledges, *id.* at 14 n.4, *addressed the merits* of Mr. Mejia's claim of ineffective assistance of counsel, holding that "an attorney's deficient representation does not deprive an alien of due process if the deficient representation merely prevents the alien from being eligible for suspension of deportation," Appendix A at 20a, thus making it entirely appropriate for this Court to do the same. *E.g., City of Oklahoma City v. Tuttle,* 471 U.S. 808, 815-16 (1985). No conceivable interest would be served by compelling Mr. Mejia — whose appeal to the BIA from the deportation order was handled *by the same attorneys* who represented him in the deportation proceedings — to proceed further before the BIA when the Eleventh Circuit, before which court the BIA's decision would be subject to review, has announced that *no* claim of ineffective assistance will lie in the case. Notably, the government does not fault Mr. Mejia for not performing the impossible feat of having the lawyers whose representation was defective raise their own ineffective representation on review before the BIA in order to secure judicial review.

Moreover, the very limited power of the BIA to address constitutional issues, Petition at 21, brings into focus Mr. Mejia's *Sixth Amendment* claim — the claim that was adjudicated in his favor by the Florida state courts and which forms the cornerstone of the constitutional violation that Mr. Mejia sought to press before the district court on habeas corpus. The government suggests that Mr. Mejia's first question presented for review should not be considered by the Court because a ruling on the question "is entirely unnecessary to [a] resolution of petitioner's case." Respondents' Brief at 10. Unless the government is suggesting that the BIA has jurisdiction to consider Mr. Mejia's Sixth Amendment claim, this is an inaccurate statement.

As set forth in the Petition, the Florida courts ruled that Mr. Mejia was denied effective assistance of counsel in the state plea proceedings because his counsel (as well as the state judge and prosecutor) affirmatively misled him as to the immigration consequences of entering a no contest plea. Petition at 18-22. As the government essentially concedes, Respondents' Brief at 11, the Eleventh Circuit refused to allow Mr. Mejia to pursue the Sixth Amendment claim on habeas corpus, apparently believing that its rejection of Mr. Mejia's *Fifth Amendment* claim fully addressed the ineffectiveness claims. Appendix A at 11a. While recognizing that a grant of certiorari is appropriate as to the Eleventh Circuit's Fifth Amendment ruling, the government similarly declines to address Mr. Mejia's Sixth Amendment claim here.

The Sixth Amendment claim arises *solely from the ineffective assistance provided to Mr. Mejia in the state trial proceedings*. The Florida court has adjudicated that claim and ruled that Mr. Mejia was indeed denied effective assistance of counsel. As the record before this Court reflects, Mr. Mejia was represented in the immigration proceedings

by the same attorney who had represented him in the original plea proceedings (along with a second lawyer). The undisputed facts show that Mr. Mejia's lawyers believed that the plea arrangements in state court prohibited the INS from using the withhold of adjudication entered by the state court against Mr. Mejia in the immigration proceedings, either as a basis for deportation or for pretermitting an application for suspension of deportation. (LA:95, 107-08, 126-27, 230-36). The state court "conviction," however, indeed precluded Mr. Mejia from seeking a suspension of deportation. Appendix F; Appendix G.

Mr. Mejia's *Fifth Amendment* claim of ineffective assistance of counsel is thus inextricably intertwined with the *Sixth Amendment* violation, the existence of which is no longer subject to question, in the state-court proceedings. The government's attempt to sever the two claims, and thereby to assert that the Court need not address the availability of habeas corpus following the enactment of the IIRIRA, should not succeed. Mr. Mejia's Fifth Amendment claim, which claim the government acknowledges should be subject to further review, cannot be addressed in a vacuum, *i.e.*, without consideration of the pre-existing and causative Sixth Amendment deprivation in the state courts. Because the BIA is not an Article III court that may consider the constitutional taint of a Sixth Amendment violation in the state courts on an application for writ of habeas corpus, Mr. Mejia will be afforded *no judicial review* of his Sixth Amendment claim under the course proposed by the government.

It is certainly true, as the government notes, that this Court has declined to consider on certiorari any number of decisions of the court of appeals addressing the availability of habeas corpus under the "transitional" provisions of Section 309(c)(4) of the IIRIRA. *See* Petition at 10-11;

Respondents' Brief at 10-11. The government leaves unexplained, however, why those denials should cut against a grant of certiorari where, as the government at least silently concedes, a direct conflict exists among the Circuits on the question whether habeas corpus survives the IIRIRA — and where Mr. Mejia will suffer the undeniable loss of *all judicial review* of his Sixth Amendment-derived habeas corpus claim if the Eleventh Circuit's decision on this point goes unreviewed.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition should be granted.

Respectfully submitted,

ELLIOT H. SCHERKER
Counsel of Record
OSCAR LEVIN
BRENDA K. SUPPLE
GREENBERG TRAURIG, P.A.
Attorneys for Petitioner
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500